Petition

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No. —

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GENERAL ATOMIC COMPANY,
Petitioner,

v.

UNITED NUCLEAR CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether a federal district court has subject-matter jurisdiction under Section 9 of the Federal Arbitration Act, 9 U.S.C. § 9, and under 28 U.S.C. § 1331 to confirm an award resulting from an arbitration conducted within its district pursuant to the Federal Arbitration Act.

PARTIES TO THIS PROCEEDING

Petitioner General Atomic Company (hereinafter "GAC") is a partnership whose constituent partners are Gulf Oil Corporation and Scallop Nuclear, Inc. Scallop is a subsidiary of the Royal Dutch/Shell Group. Respondent United Nuclear Corporation (hereinafter "UNC") is a subsidiary of UNC Resources, Inc.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. A., pp. 1a-9a, *infra*) is reported at 655 F.2d 968 (1981). The opinion of the United States District Court for the Southern District of California (Pet. App. B, pp. 10a-15a, *infra*) is not reported separately but is reprinted, with the exception of two sentences, in the opinion of the court of appeals (Pet. App. A., pp. 4a-9a, *infra*).

JURISDICTION

The order of the court of appeals affirming the district court's dismissal of the application for confirmation of Partial and Final Arbitration Awards on juris-

dictional grounds (Pet. App. A, pp. 1a-3a, *infra*) was entered on September 8, 1981. On November 30, 1981, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including December 30, 1981 (Pet. App. D, p. 18a, *infra*). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 9 of the Federal Arbitration Act, 9 U.S.C. § 9 (1976), provides as follows:

> § 9. Award of arbitrators; confirmation; jurisdiction; procedure
>
> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice on motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the

marshal of any district within which the adverse party may be found in like manner as other process of the court.

28 U.S.C. § 1331 provides as follows:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.[1]

STATEMENT

On May 30, 1978, this Court set aside as unconstitutional an order of a New Mexico court which had "stayed" GAC's demand under the Federal Arbitration Act for arbitration of a contract dispute with UNC.[2] *General Atomic Co.* v. *Felter,* 436 U.S. 493

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[1] 28 U.S.C. § 1331 was amended, effective December 1, 1980, to eliminate the jurisdictional amount-in-controversy requirement. At the time GAC's petition for confirmation was filed in September 1980, a jurisdictional-amount requirement of $10,000 was in effect. There is no claim that less than the jurisdictional minimum is at issue.

[2] The demand was based on an arbitration clause which was contained in a 1973 Uranium Supply Agreement concluded between UNC and GAC's predecessor in interest. It provided as follows:

> Art. XVII
> ARBITRATION
>
> In the event that any disputes, which may arise between the parties during the course of this Agreement, cannot be mutually resolved, either party may elect to submit such disputes to arbitration in accordance with the Rules of the American Arbitration Association. Upon notice of such election each party shall designate one member of the arbitration panel and the designees shall choose an impartial third member who shall chair the panel.
>
> The panel shall hear and consider the position of each party and shall equitably resolve the dispute by a determination based on the terms and conditions of this Agreement. Such

(1978). The requested arbitration—which had been delayed by illegal orders of the State court for more than two years—was then conducted in San Diego, California, the location approved by the American Arbitration Association, before a distinguished panel of arbitrators. The Chairman of the Arbitration Panel was former Illinois Supreme Court Justice Walter V. Schaefer, and the other members of the Panel were W. Willard Wirtz, former Secretary of Labor, and Julian H. Levi, a University of Chicago law professor. After giving careful attention during four days of oral presentation in San Diego to preliminary legal issues[3] and conducting ten days of hearings in San Diego on the merits, a majority of the Arbitration Panel made a final award in San Diego in September 1980. The award granted GAC more than three hundred million dollars in damages[4] and directed specific performance of future deliveries of uranium pursuant to the parties' contract. The sole issue on this petition is whether a federal court in California has jurisdiction under the Federal Arbitration Act to confirm that award.

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determination shall be final and binding on both parties and judgment upon the award rendered by the Arbitrators may be entered in any Court having jurisdiction thereof.

[3] The disputed legal issues were resolved in GAC's favor in a 38-page Partial Award issued on November 14, 1979.

[4] This was compensatory damages to GAC for more than 9 million pounds of uranium which was to have been delivered under the contract but which UNC instead sold at greatly increased prices to other purchasers. UNC had contracted to sell the uranium to GAC at prices between $7.30 and $12.06 per pound. As a result of its refusal to abide by the contract, it received between $31.95 and $41.13 per pound for its uranium. In the meantime, GAC was compelled to purchase uranium from other sources to carry out supply obligations to utilities.

On the day the final arbitration award was filed with the office of the American Arbitration Association in San Diego, GAC filed a motion to confirm in the United States District Court for the Southern District of California in San Diego, invoking federal jurisdiction under 28 U.S.C. § 1331 and under the Federal Arbitration Act, 9 U.S.C. § 9. On UNC's motion, the district court ruled that it had "no subject matter jurisdiction to confirm the awards in question" (Pet. App. B, p. 14a, *infra*), and it dismissed GAC's action. The district court observed, however, that Section 9 of the Federal Arbitration Act "on its face . . . could be read as granting the district court jurisdiction of an application to confirm an award" (*id.*, p. 12a, *infra*), and the district judge said, in conclusion, that he was (*id.*, p. 15a, *infra*):

> not unmindful of the difficulties GAC will encounter in its attempt to obtain confirmation of the arbitration awards. Since this court is the "United States court in and for the district within which such award was made," 9 U.S.C. § 9, an order which effectively divests the court of its jurisdiction over the matter leaves GAC without an alternative remedial option under the Federal Arbitration Act. However, the court is compelled, on the basis of the authorities cited herein, to dismiss the application for lack of subject matter jurisdiction.

The Court of Appeals for the Ninth Circuit affirmed the district court's dismissal of this action, adopting the district judge's decision and accompanying reasons (Pet. App. A, pp. 2a-3a, *infra*).

The district judge's prediction regarding GAC's "difficulties" in obtaining confirmation of the arbitra-

tion award was borne out by the subsequent action of the California state courts. Following the dismissal of the federal-court proceeding, GAC filed an application for confirmation in the local California court of general jurisdiction—the Superior Court for San Diego County.[5] The trial judge denied UNC's motion to dismiss that proceeding for lack of *in personam* jurisdiction, but the California Court of Appeal, without hearing oral argument or receiving plenary briefs, issued a peremptory writ directing that GAC's confirmation proceeding be dismissed for want of jurisdiction. *United Nuclear Corp.* v. *The Superior Court of the State of California for the County of San Diego,* 113 Cal. App. 3d 359, 169 Cal. Rptr. 827 (1980). The California Supreme Court then denied discretionary review, *United Nuclear Corp.* v. *The Superior Court of San Diego County,* No. 24286 (Cal.S.Ct., Feb. 18, 1981), and this Court denied certiorari, *General Atomic Co.* v. *United Nuclear Corp.,* No. 80-2106, 50 U.S.L.W. 3219 (1981).[6]

REASONS FOR GRANTING THE WRIT

The decision below leaves GAC in the bizarre posture of having an arbitration award secured under federal law which cannot be judicially reviewed by

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[5] This was done as a protective measure, to secure GAC's right to have some court in California—where the arbitration was held and the award made—pass on the validity of the award. *See United States* v. *Ets-Hokin Corp.,* 397 F.2d 935, 938-39 (9th Cir. 1968).

[6] Details regarding the proceeding in the State courts of California and New Mexico are reported in the petitions filed by GAC in *General Atomic Co.* v. *United Nuclear Corp.*, No. 80-2106, and *In re General Atomic Co.*, No. 80-2107, both of which were denied on October 5, 1981.

any court in the State where the arbitration was held and decided. The ruling of the lower courts denies to federal courts any independent substantive authority to confirm an award resulting from an arbitration conducted under the Federal Arbitration Act. It thereby effectively deprives the prevailing party in an arbitration under the federal act of the right granted and secured by federal law at the stage where that right is most meaningful—*i.e.*, when the result of the arbitration must be implemented. This Court should review and reverse the judgment because (1) it is contrary to the "plain language" of the Federal Arbitration Act and of the Federal Judicial Code, (2) it conflicts with the view of another federal court of appeals, and (3) it is inconsistent with this Court's interpretation of the policies underlying the Federal Arbitration Act and will do great damage to the objectives of the Act.

(1) The Federal Arbitration Act and the Judicial Code grant federal subject-matter jurisdiction in "plain language."

In very recent decisions, this Court has stressed the importance of unambiguous statutory language in determining the meaning of a federal law. *E.g., Howe* v. *Smith,* 101 S. Ct. 2468, 2473-2474 (1981); *American Textile Mfrs. Institute, Inc.* v. *Donovan,* 101 S. Ct. 2478, 2490-2492 (1981); *United States* v. *Turkette,* 101 S. Ct. 2524, 2527 (1981). In this case, Congress' allocation of jurisdiction could hardly be stated more plainly and unambiguously.

(a) The Language of Section 9.

The Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, prescribes how arbitration clauses in contracts "evi-

dencing a transaction involving commerce," 9 U.S.C. § 2, are to be enforced. Section 9 of the Act details the procedure for judicial enforcement of a completed arbitration. It states, in relevant part (emphasis added):

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. *If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.*

Section 9 plainly and unambiguously prescribes the course to be followed upon the conclusion of an arbitration under the federal act if the parties have agreed that an award is to be enforceable in a court of law:

(1) If the arbitration agreement designates the trial court which is to pass upon an arbitration award, the prevailing party should apply for confirmation to the designated court.

(2) If the agreement fails to designate a particular court, the application for confirmation "may be made to the United States court in and for the district within which such award was made."

The present case concerns the second of these alternatives. The arbitration clause contained in the GAC/UNC contract *did* provide for judgment to be entered

on an arbitration award (*see* note 2, *supra*), but it *did not* specify the court that is to have jurisdiction over the confirmation proceeding. The arbitration was held and the award was made in San Diego, California. Under the plain language of Section 9, GAC's application for confirmation was properly filed with the United States District Court for the Southern District of California in San Diego, the "United States court in and for the district within which such award was made."

By the same token, the plain language of Section 1331 confers jurisdiction on the federal district court. Section 1331 grants federal courts jurisdiction over a civil action "arising under the Constitution, laws, or treaties of the United States." GAC's confirmation action "arises under" the Federal Arbitration Act because it is a proceeding specifically authorized by Congress to confirm an award in an arbitration regulated by the federal statute and is to be governed by standards set out in the federal law.

(b) *Section 4 Limitation Inapplicable to Section 9.*

The court of appeals and the district court overrode the plain meaning of 9 U.S.C. § 9 and 28 U.S.C. § 1331 because they mistakenly applied to confirmation proceedings the jurisdictional limitation which the Federal Arbitration Act explicitly imposes only on actions to compel an unwilling party to arbitrate. Actions to compel arbitration are strikingly different from a confirmation proceeding because they are instituted *before* an arbitration even begins. The statutory language of Section 4, which deals with proceedings to compel arbitration, bears no resemblance to the language of Section 9, as is illustrated by com-

paring the statutory terms used in defining the courts in which the parties should proceed:[7]

Section 4	Section 9
"any United States district court which, save for such agreement, would have jurisdiction under title 28"	"the United States court in and for the district within which such award was made"

Whereas Section 4 empowers federal courts to act only if they "would have jurisdiction under Title 28" apart from the arbitration agreement, Section 9 contains no such qualification. The assignment of authority in post-arbitration proceedings to the federal courts is entirely unconditional,[8] and the Federal Arbitration Act contains no suggestion whatever that the jurisdictional limitation of Section 4 must be applied

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[7] The full text of the pertinent part of Section 4 is as follows (emphasis added):

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition *any United States district court which, save for such agreement, would have jurisdiction under title 28*, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

[8] Both Sections 10 and 11 of the Act vest jurisdiction to vacate or modify awards in "the United States court in and for the district wherein the award was made." This parallels the second sentence of Section 9. In addition, Section 7, which relates to compulsory process during an arbitration conducted under the Federal Arbitration Act, specifies that the "United States district court" is to compel the attendance of witnesses, thereby manifesting Congress' intent that federal courts be available to implement provisions of the Act once the arbitration has begun.

to any other provision. Therefore, the statute generally conferring federal-question jurisdiction, 28 U.S.C. § 1331, applies to proceedings under Sections 9, 10 and 11. For these reasons, federal courts are empowered by Section 9, together with the general grant of federal-question jurisdiction in 28 U.S.C. § 1331, to confirm federal arbitration awards. The contrary decision of the courts below conflicts with the plain language of federal statutes and with this Court's many recent instructions regarding federal statutory interpretation.

(c) *Coherency of the Act.*

The courts below erroneously believed that conferring federal subject-matter jurisdiction to confirm arbitration awards would make the Arbitration Act a "'patchwork of individual statutes bereft of any coherent plan'" (Pet. App. A, p. 6a, *infra*). It is entirely sound and coherent to deny federal courts independent authority to compel a future arbitration but to empower them to confirm, vacate or modify arbitration awards which have been issued. Confirmation proceedings are summary in nature, and they turn on the application of federal statutory standards. By contrast, Section 4 itself indicates that actions to compel arbitration may require jury trials. And in deciding whether to compel arbitration, courts pass on issues which are not uniquely federal but are common to contract actions generally. Thus a potentially heavy burden, which is not uniquely federal, would be cast on the federal courts if Section 4 proceedings were within federal-court jurisdiction. The same is not true of Section 9.

Nor is there any substance whatever to the court of appeals' expressed concern that a district court which

lacks subject-matter jurisdiction under Section 4 could "threaten to confirm a subsequent *ex parte* award under Section 9" (Pet. App. A, p. 2a, *infra*). It would be wholly improper for a court lacking jurisdiction to make any such "threat," and the "threat" would, in any event be totally ineffectual to validate an arbitration award if it were otherwise illegal.[9]

(2) The Ninth Circuit's decision conflicts with the expressed view of the Second Circuit.

The Ninth Circuit's ruling that a federal district court would not have jurisdiction to confirm a federal arbitration award in the absence of diversity of citizenship conflicts with an alternative holding of the Second Circuit in *Reed & Martin, Inc.* v. *Westinghouse Electric Corp.*, 439 F.2d 1268 (2d Cir. 1971). In that action to confirm an arbitration award, diversity of citizenship did exist. The court of appeals sustained the exercise of federal authority not only on grounds of diversity of citizenship, however. It went on to say (439 F.2d at 1276):

> Furthermore, [the District Court] is specifically empowered and enjoined to confirm and enter judgment upon arbitration awards by virtue of the United States Arbitration Act.

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[9] The district court's fear that if subject-matter jurisdiction were upheld, the federal courts would be involved in awards which did not arise out of maritime transactions or contracts affecting commerce is similarly erroneous. (Pet. App. B., p. 14a, n. 1, *infra*.) The Federal Arbitration Act is limited to such arbitrations, and no other arbitration awards would be confirmable either under 9 U.S.C. § 9 or under 28 U.S.C. § 1331.

After quoting the first two sentences of Section 9, the court held (*id.*):

> Since the arbitration was lawfully held in New York City, the District Court in that district had jurisdiction to confirm the award.

A decision of the Court of Appeals for the Fifth Circuit—*City of Naples* v. *Prepakt Concrete Co.*, 490 F.2d 182 (5th Cir.), *cert. denied*, 419 U.S. 843 (1974)—explicitly left open the important question of the subject-matter jurisdiction of federal courts. *See* 490 F.2d at 184 n. 6.[10] We demonstrate below that the issue is of increasing importance and will doubtless affect the willingness of parties in large commercial transactions to undertake arbitration of their disputes. The conflict of views among the circuits should not be left unresolved—particularly not in a case involving hundreds of millions of dollars and a federal arbitration which was unjustly delayed for several years until recourse was sought and granted twice in this Court.

(3) The jurisdictional issue is important, likely to recur, and requires prompt resolution for the guidance of those negotiating major commercial contracts.

The decision below closes the doors of the federal courts to a prevailing party in a non-maritime federal

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[10] Some lower-court decisions have incorrectly extended the limitation of Section 4 to other sections of the Federal Arbitration Act, but only one court, a district court in *Bangor & Aroostook R. Co.* v. *Maine Central R. Co.*, 359 F.Supp. 261 (D.D.C. 1973), has dismissed a proceeding to confirm under Section 9 on this ground. Even while dismissing the action, the trial judge in that case admitted that the "statutory language lends support to the plaintiff's thesis." 359 F.Supp. at 263.

arbitration if the parties to the dispute do not satisfy diversity-of-citizenship standards. This ruling has major ramifications for large commercial concerns which might otherwise routinely agree upon arbitration as the means for resolving disputes arising from their business relations.

Arbitration provides a speedy and efficient alternative to litigation, and the purpose of the Congress which enacted the Federal Arbitration Act in 1925 was to encourage resort to that alternative.[11] Availability of arbitration also relieves the federal and local judiciaries of the ever-increasing pressures of a litigious society. The certain enforceability of arbitration agreements and the streamlined remedy afforded by the arbitration process have eased some of the courts' burdens.[12]

It is important, however, for parties who choose the arbitration course to know that the results of the arbitration process will be enforceable and will not be

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[11] *See, e.g., Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 510-511 (1974); *Wilko* v. *Swann*, 346 U.S. 427, 431 (1953); H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1925); S. Rep. No. 536, 68th Cong., 1st Sess. 3 (1925).

[12] *See, e.g.*, Monroe, "Commercial Arbitration: A Substitute for Franchise Contract Litigation," 26 *Arb. L.J.* 147, 149 (1971); Note, "Classwide Arbitration: Efficient Adjudication or Procedural Quagmire?", 67 *U.Va.L.Rev.* 787, 787 (1981); Asken, "Legal Considerations in Using Arbitration Clauses to Resolve Future Problems Which May Arise During Long-Term Business Agreements," 28 *Bus. Law.* 595, 595, n.4 (1973) (*quoting* Hon. Warren Burger, then Judge of the United States Court of Appeals for the District of Columbia Circuit, Address before the American Arbitration Association, Minneapolis, Minn., November 1968: "We must in the public interest move toward taking a large volume of private conflicts out of the courts and into the channels of arbitration.")

stymied by hostile judges. Whether or not diversity of citizenship exists between two contracting parties at the time an arbitration is concluded is often a matter of sheer fortuity.[13] Commercial plans of great magnitude cannot depend on such uncertainties.[14] In this case, State courts in a jurisdiction which has been hostile to this arbitration since its inception—courts which issued and approved two unconstitutional orders delaying the arbitration for over two years—have now undertaken to declare the arbitration "null and void" and to "vacate" the awards of Justice Schaefer and Mr. Wirtz.[15] A similar outcome may lie in store for

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[13] In this case, for example, at the time the 1973 Supply Agreement was signed, there *was* diversity of citizenship between the two contracting parties, Gulf Oil Corporation, a Pennsylvania corporation, and UNC, a Delaware corporation. Some time thereafter, GAC was created as a partnership between two corporate entities—Gulf Oil Corporation and Scallop Nuclear, Inc.,—and was assigned the rights and liabilities of Gulf under the 1973 contract. Because Scallop Nuclear, Inc., like UNC, is a Delaware corporation, diversity of citizenship was destroyed after the arbitration clause had been agreed upon.

[14] Indeed, if the court below is correct and Section 9 does not confer subject-matter jurisdiction, the parties could not even designate a federal court in their agreement as the one to confirm any arbitration award. It is well-established that if federal subject-matter jurisdiction is not conferred by statute, it may not be created merely by agreement of the parties. *See, e.g., Brenner* v. *Manson,* 383 U.S. 519, 523 (1966); *Stratton* v. *St. Louis Southwestern Ry. Co.,* 282 U.S. 10, 18 (1930).

[15] The same New Mexico state trial court which had delayed the federal arbitration with unconstitutional orders from April 2, 1976, until this Court's decision in May 1978, held on January 9, 1981, that "[t]he arbitrators had no jurisdiction to issue an award in the purported arbitration" and entered a "supplemental judgment" voiding the arbitration and vacating the awards. *See United Nuclear Corp.* v. *General Atomic Co., et al.,* No. 50827 (Jan. 9, 1981).

other arbitrations if awards are not confirmable in the federal district where the arbitration was conducted and decided. This will deter responsible corporate officials from entering into arbitration agreements in the future.

Moreover, the issue is likely to recur. Although diversity of citizenship has been present in most of the reported cases involving confirmation of arbitration awards, the increasing popularity of limited partnerships as business entities[16] and of joint-venture partnerships among corporations[17] makes it probable that many substantial arbitrations between parties of non-diverse citizenship will arise in the future. Furthermore, Congress has been seriously considering the abolition of diversity-of-citizenship jurisdiction.[18] If

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[16] *See, e.g.*, Aslanides, Cardinali, Haynsworth, Lane & Niesar, "Limited Partnerships—What's Next and What's Left?," 34 *Bus. Law.* 257, 258 (1978); A. F. Conrad, R. L. Knauss & S. Siegel, *Agency, Associations, Employment, Licensing and Partnerships*, p. 21 (2nd ed. 1977).

[17] *See, e.g.*, 6 *Fletcher, Cyclopedia of the Law of Private Corporations*, § 2520, pp. 372-73; 377 n.6 (perm. ed. 1979); O'Neal, "Comments on Recent Developments in Limited Partnership Law," 1978 *Wash. U.L.Q.* 669, 684 (1978); Asken, "Legal Considerations in Using Arbitration Clauses to Resolve Future Problems Which May Arise During Long-Term Business Agreements," 28 *Bus. Law.* 595, 597-598 (1973); Armstrong, "Can Corporations Be Partners?" 20 *Bus. Law.* 899, 907-910 (1965).

[18] *See, e.g.*, H.R. 2404, 97th Cong., 1st Sess. (1981); S. 679, 96th Cong., 1st Sess. (1979); H.R. 2202, 96th Cong., 1st Sess. (1979); *Jurisdictional Amendments Act of 1979, Hearings on S. 679 Before the Committee on the Judiciary, United States Senate*, 96th Cong., 1st Sess. (1979).

such legislation is enacted and if the decision below is permitted to stand, many arbitration agreements now in effect may produce awards which will no longer be reviewable in federal courts and which could be invalidated in local tribunals that are hostile to arbitration and to the policies of the Federal Arbitration Act. In these circumstances, "[t]he needs of the subject matter manifestly call for uniformity" which can best be secured by recognizing subject-matter jurisdiction in the federal courts. *See Int'l Ass'n of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682, 691-692 (1963).

CONCLUSION

Between 1976 and 1978, the New Mexico courts unconstitutionally barred arbitration of this very substantial contract dispute between GAC and UNC. After this Court twice declared such interference unlawful, the arbitration was finally heard in San Diego by a highly qualified panel which ruled, in late 1980, in GAC's favor. The federal courts in California have now refused to assume jurisdiction to confirm that award even though they have concluded that this "leaves GAC without an alternative remedial option under the Federal Arbitration Act" (Pet. App. A, p. 15a, *infra*). They have felt "compelled" (*id.*) to reach this result because of judicial decisions that are inapposite and that are, in any event, not binding on this Court.

Certiorari should be granted in this case not only to correct the important error of law committed by the courts below on the issue of federal jurisdiction and to provide certainty for the future on this disputed legal question, but to prevent a mammoth injustice.

If the federal courts in California are powerless to review and confirm the arbitration award and the State courts in California refuse to do so on the ground that they lack *in personam* jurisdiction over UNC (see p. 6, *supra*), the award will be left to disposition by the courts of New Mexico—the forum which has, without exception, restrained, interfered with and delayed the federal arbitration process, and which has no statutory jurisdiction under federal law to review an award growing out of an arbitration held under the Federal Arbitration Act in California.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 30, 1981

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 80-5830

GENERAL ATOMIC CO., *Appellant*,

v.

UNITED NUCLEAR CORP., *Appellee*.

Argued and Submitted June 2, 1981.

Decided Sept. 8, 1981.

Appeal was taken from an order of the United States District Court, for the Southern District of California, William B. Enright, J., which dismissed an application for confirmation of an arbitration award for lack of subject matter jurisdiction. The Court of Appeals, Nelson, Circuit Judge, held that provisions of Arbitration Act did not confer subject matter jurisdiction upon federal district court to entertain application for confirmation of arbitration award.

Affirmed.

Appeal from the United States District Court for the Southern District of California.

Before TANG and NELSON, Circuit Judges, and WILLIAMS,* District Judge.

NELSON, Circuit Judge:

*** Hon. Spencer Williams, United States District Judge, Northern District of California, sitting by designation.**

In this expedited appeal, General Atomic Company ("GAC") seeks review of the district court's dismissal, for lack of subject matter jurisdiction, of GAC's application for confirmation of an arbitration award pursuant to 9 U.S.C. § 9. We affirm.

"It is a fundamental principle that federal courts are courts of limited jurisdiction. The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374, 98 S.Ct. 2396, 2403, 57 L.Ed.2d 274 (1978). A federal court is presumed to lack jurisdiction in a particular case unless the contrary affirmatively appears. *California ex rel. Younger v. Andrus*, 608 F.2d 1247, 1249 (9th Cir. 1979). *See generally* 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3522 (1975).

GAC argues that subject matter jurisdiction for confirmation of an arbitration award arises from the very language of section 9. We disagree, however, and feel that such an interpretation would work great mischief to the overall scheme of the Arbitration Act. In particular, that interpretation presents a significant possibility of eviscerating the clear limits on federal jurisdiction contained in sections 3 and 4. GAC's expansive interpretation would mean, for example, that a district court lacking jurisdiction to compel arbitration under section 4 might nonetheless threaten to confirm a subsequent *ex parte* award under section 9. Such a threat would have a substantial compulsory effect. We cannot approve an interpretation which would achieve by indirection that which Congress has clearly forbidden.

The district court's unpublished decision is set forth in the appendix annexed to this opinion. After independently examining the issues we find that we entirely agree with the district court's decision and its accompanying reasons. We therefore affirm its judgment and adopt its analy-

sis of the issues. No useful purpose would be served by our extending this opinion to repeat the analysis.

We hold that applicants who, in federal district court, seek confirmation of an arbitration award under 9 U.S.C. § 9, must demonstrate independent grounds of federal subject matter jurisdiction. The provisions of 9 U.S.C. § 9 do not in themselves confer subject matter jurisdiction on a federal district court. Because no independent ground of jurisdiction existed in the case under review, the district court correctly dismissed for lack of subject matter jurisdiction.

AFFIRMED.

APPENDIX *

DISTRICT COURT

MEMORANDUM DECISION

ENRIGHT, District Judge:

In this action applicant General Atomic Company (GAC) seeks confirmation of the Partial and Final Arbitration Awards rendered in San Diego by the Arbitration Panel in the above named matter, pursuant to the provisions of 9 U.S.C. § 9. In connection with its application for confirmation, GAC moved this court for a preliminary injunction to enjoin the New Mexico state court from conducting proceedings in connection with United Nuclear Corporation's (UNC's) motions therein for vacation of the awards.

In 1973 UNC and Gulf entered into a Supply Agreement (1973 Supply Agreement) which contained an arbitration clause, whereby UNC agreed to supply uranium to Gulf. Subsequently, Gulf assigned its interest in the Agreement to GAC, the applicant herein. In 1975, UNC ceased deliveries of uranium under the Agreement and instituted proceedings in the New Mexico state court system against GAC. In November of 1979, GAC filed a demand to arbitrate with the American Arbitration Association in San Diego. In the arbitration proceedings at issue herein, the Panel attempted to resolve both the procedural intricacies and the merits of the 1973 Supply Agreement disputes between GAC and UNC.

In the Partial Award, dated November 14, 1979, the Panel held that it was not required to give full faith and credit to the New Mexico state court decisions regarding the validity of the 1973 Supply Agreement. In addition, it

---

* A portion of the district court's decision unrelated to this appeal has been omitted.

found that GAC had not waived its right to invoke the arbitration provision contained in the Supply Agreement. The Panel held in the Final Award, dated September 10, 1980, that the 1973 Supply Agreement was valid and enforceable against UNC. It further ordered UNC to specifically perform portions of the Agreement and to pay GAC $301,181,635 in damages for breach thereof.

In addition to the issues UNC has raised regarding the merits of the decisions issued by the Arbitration Panel, it contends that this court lacks the requisite subject matter jurisdiction to entertain GAC's application.

Upon due consideration of the parties' memoranda and extensive exhibits, and the arguments advanced at the hearing, the court hereby dismisses the application for confirmation of the Partial and Final Arbitration Awards for lack of subject matter jurisdiction. In addition, because the New Mexico state court action has been removed to a federal district court, the court denies GAC's motion for preliminary injunction.

In addressing UNC's argument that this court lacks subject matter jurisdiction over the instant action, the court notes that federal courts are courts of limited jurisdiction, and the presumption is that they are without power to act unless the contrary affirmatively appears. *Fifty Associates v. Prudential Insurance Company of America,* 446 F.2d 1187, 1190 (9th Cir. 1970), *later appeal* 450 F.2d 1007 (9th Cir. 1971).

GAC filed its application for confirmation of the Arbitration Awards pursuant to Section 9 of the Federal Arbitration Act. 9 U.S.C. § 9. This section provides in part that:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year

> after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.

9 U.S.C. § 9

The arbitration clause contained in the 1973 Supply Agreement does not limit the confirmation of an award thereunder to a specific court. Therefore, GAC seeks to invoke this court's jurisdiction under the portion of Section 9 which authorizes application for confirmation to be "made to the United States court in and for the district within which such award was made." 9 U.S.C. § 9. GAC urges that the plain language of Section 9 justifies an assertion of jurisdiction by this court whether or not independent jurisdictional grounds exist.

The lower courts are in agreement that the Arbitration Act itself is not a grant of jurisdiction. Section 9 is potentially inconsistent with this view because on its face it could be read as granting the district court jurisdiction of an application to confirm an award. On the other hand, Section 9 does not contain language common to jurisdictional grants, and to require independent jurisdictional grounds under other sections and not under Section 9 renders the Act a "patchwork of individual statutes bereft of any coherent plan." Thus, the provisions of the Act apply to actions which have an independent jurisdictional basis. 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure,* § 3569, 467-470 (1975).

Courts have consistently held that actions brought under the Federal Arbitration Act require an independent

jurisdictional basis. *Commercial Medals Co. v. Balfour, Guthrie & Co.*, 577 F.2d 264 (5th Cir. 1978); *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909, 80 S.Ct. 682, 4 L.Ed.2d 618, *cert. dismissed*, 364 U.S. 801, 81 S.Ct. 27, 5 L.Ed.2d 37 (1960); *Mengel Co. v. Nashville Paper Prod. & Spec. Workers Union*, 221 F.2d 644 (6th Cir. 1955); *S. J. Groves & Sons v. American Arbitration Association*, 452 F.Supp. 121 (D.Minn. 1978); *Middlebury Associates v. R. E. Bean Construction*, 446 F.Supp. 28 (D.Ver. 1977). Further, it has been held that the only logical interpretation of the statutory scheme is that actions under Section 9 require an independent jurisdictional basis. *Bangor & Aroostook R. Co. v. Maine Central R. Co.*, 359 F.Supp. 261, 262-64 (D.D.C.1973); *See, Ballantine Books, Inc. v. Capital Distributing Co.*, 302 F.2d 17, 19 (2d Cir. 1962); *Williams v. Beyer*, 455 F.Supp. 482, 484 (D.N.H. 1978); *Litton RCS, Inc. v. Pennsylvania Turnpike Commission*, 376 F.Supp. 579, 585 (E.D.Pa. 1974); *aff'd without opinion*, 511 F.2d 1394 (3d Cir. 1975).

The cases which GAC has cited in support of its position that no independent jurisdictional grounds are required for an application under Section 9 do not justify a different result. Because diversity existed in *Reed & Martin, Inc. v. Westinghouse Electric Corp.*, 439 F.2d 1268, 1276 (2d Cir. 1971), the Second Circuit was not compelled to determine whether, in the absence of diversity, Section 9 conferred jurisdiction. The Fifth Circuit specifically declined to hold diversity was necessary to supply jurisdiction under Section 9 in *City of Naples v. Prepakt Concrete Co.*, 490 F.Td. 182, 184 n.6 (5th Cir.), *reh. denied*, 494 F.2d 511 (5th Cir.), *cert. denied*, 419 U.S. 843, 95 S.Ct. 76, 42 L.Ed.2d 71 (1974). However, because diversity existed in *City of Naples*, this issue was not before the court. Thus, this case provides no authority for GAC's position that independent jurisdictional grounds are unnecessary under Section 9.

GAC has cited no persuasive authority for its contention that the "plain language" of Section 9 constitutes a conferral of jurisdiction.[1] Therefore, this court agrees with the proposition that the Federal Arbitration Act is a single enacted piece of legislation, and to read Section 9 separately from the other provisions would produce an "odd patchwork of individual statutes bereft of any coherent plan." *Bangor & Aroostook R. Co. v. Maine Central R. Co., supra.* at 263.

Since GAC has alleged no independent grounds to justify an exercise of federal jurisdiction in the instant application, that is, diversity of citizenship or a federal question other than the enforcement of the arbitration agreement, this court has no subject matter jurisdiction to confirm the awards in question and therefore dismisses the application for confirmation. . . .

In rendering this decision, the court is not unmindful of the difficulties GAC will encounter in its attempt to ob-

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[1] The provisions of the Federal Arbitration Act apply to written clauses in maritime transactions or contracts evidencing a transaction involving commerce. 9 U.S.C. §§ 1, 2. *See generally, Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401, 87 S.Ct. 1801, 1804, 18 L.Ed.2d 1270 (1967); *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 76 S.Ct. 273, 100 L.Ed. 199 (1956); *Grand Bahama Petroleum Co. v. Asiatic Petroleum Corp.*, 550 F.2d 1320, 1324 (2d Cir. 1977); *Merritt-Chapman & Scott Corp. v. Pennsylvania Turnpike Commission*, 387 F.2d 768, 772 (3d Cir. 1967). If GAC's argument regarding the "plain language" of Section 9 is accepted and carried to its logical extreme, district courts may well be required to entertain all applications for confirmation of awards rendered in their districts irrespective of whether the contracts involved maritime transactions or evidenced transactions involving commerce. This court is unwilling to create such an expansion of federal jurisdiction by declaring that Section 9, by itself, on its face, confers subject matter jurisdiction.

tain confirmation of the arbitration awards. Since this court is the "United States court in and for the district within which such award was made," 9 U.S.C. § 9, an order which effectively divests the court of its jurisdiction over the matter leaves GAC without an alternative remedial option under the Federal Arbitration Act. However, the court is compelled, on the basis of the authorities cited herein, to dismiss the application for lack of subject matter jurisdiction.

DATED: October 24, 1980.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 80-1585-E

GENERAL ATOMIC COMPANY, *Applicant*,

v.

UNITED NUCLEAR CORPORATION, *Respondent*.

(AAA Case No. 73-10-0078-77)

MEMORANDUM DECISION

Filed October 24, 1980

In this action applicant General Atomic Company (GAC) seeks confirmation of the Partial and Final Arbitration Awards rendered in San Diego by the Arbitration Panel in the above named matter, pursuant to the provisions of 9 U.S.C. § 9. In connection with its application for confirmation, GAC moved this court for a preliminary injunction to enjoin the New Mexico state court from conducting proceedings in connection with United Nuclear Corporation's (UNC's) motions therein for vacation of the awards.

In 1973 UNC and Gulf entered into a Supply Agreement (1973 Supply Agreement) which contained an arbitration clause, whereby UNC agreed to supply uranium to Gulf. Subsequently, Gulf assigned its interest in the Agreement to GAC, the applicant herein. In 1975, UNC ceased deliveries of uranium under the Agreement and instituted proceedings in the New Mexico state court system against GAC. In November of 1979, GAC filed a demand to arbitrate with the American Arbitration Association in San Diego. In the arbitration proceedings at issue herein, the Panel attempted to resolve both the

procedural intricacies and the merits of the 1973 Supply Agreement disputes between GAC and UNC.

In the Partial Award, dated November 14, 1979, the Panel held that it was not required to give full faith and credit to the New Mexico state court decisions regarding the validity of the 1973 Supply Agreement. In addition, it found that GAC had not waived its right to invoke the arbitration provision contained in the Supply Agreement. The Panel held in the Final Award, dated September 10, 1980, that the 1973 Supply Agreement was valid and enforceable against UNC. It further ordered UNC to specifically perform portions of the Agreement and to pay GAC $301,181,635 in damages for breach thereof.

In addition to the issues UNC has raised regarding the merits of the decisions issued by the Arbitration Panel, it contends that this court lacks the requisite subject matter jurisdiction to entertain GAC's application.

Upon due consideration of the parties' memoranda and extensive exhibits, and the arguments advanced at the hearing, the court hereby dismisses the application for confirmation of the Partial and Final Arbitration Awards for lack of subject matter jurisdiction. In addition, because the New Mexico state court action has been removed to a federal district court, the court denies GAC's motion for preliminary injunction.

In addressing UNC's argument that this court lacks subject matter jurisdiction over the instant action, the court notes that federal courts are courts of limited jurisdiction, and the presumption is that they are without power to act unless the contrary affirmatively appears. *Fifty Associates v. Prudential Insurance Company of America,* 446 F.2d 1187, 1190 (9th Cir. 1970), *later appeal,* 450 F.2d 1007 (9th Cir. 1971).

GAC filed its application for confirmation of the Arbitration Awards pursuant to Section 9 of the Federal Ar-

bitration Act. 9 U.S.C. § 9. This section provides in part that:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.

9 U.S.C. § 9

The arbitration clause contained in the 1973 Supply Agreement does not limit the confirmation of an award thereunder to a specific court. Therefore, GAC seeks to invoke this court's jurisdiction under the portion of Section 9 which authorizes application for confirmation to be "made to the United States court in and for the district within which such award was made." 9 U.S.C. § 9. GAC urges that the plain language of Section 9 justifies an assertion of jurisdiction by this court whether or not independent jurisdictional grounds exist.

The lower courts are in agreement that the Arbitration Act itself is not a grant of jurisdiction. Section 9 is potentially inconsistent with this view because on its face it could be read as granting the district court jurisdiction of an application to confirm an award. On the other hand, Section 9 does not contain language common to jurisdictional grants, and to require independent jurisdictional grounds under other sections and not under Section 9 renders the Act a "patchwork of individual statutes be-

reft of any coherent plan." Thus, the provisions of the Act apply to actions which have an independent jurisdictional basis. 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, § 3569, 467-470 (1975).

Courts have consistently held that actions brought under the Federal Arbitration Act require an independent jurisdictional basis. *Commercial Metals Co. v. Balfour, Guthrie & Co.*, 577 F.2d 262 (5th Cir. 1978); *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909, *cert. dismissed*, 364 U.S. 801 (1960); *Mengel Co. v. Nashville Paper Prod. & Spec. Workers Union*, 221 F.2d 644 (6th Cir. 1955); *S. J. Groves & Sons v. American Arbitration Association*, 452 F. Supp. 121 (D. Minn. 1978); *Middlebury Associates R. E. Bean Construction*, 446 F. Supp. 28 (D. Ver. 1977). Further, it has been held that the only logical interpretation of the statutory scheme is that actions under Section 9 require an independent jurisdictional basis. *Bangor & Aroostook R. Co. v. Maine Central R. Co.*, 359 F. Supp. 261, 262-64 (D.D.C. 1973); *See, Ballantine Books, Inc. v. Capital Distributing Co.*, 302 F.2d 17, 19 (2d Cir. 1962); *Williams v. Beyer*, 455 F. Supp. 482, 484 (D.N.H. 1978); *Litton RCS, Inc. v. Pennsylvania Turnpike Commission*, 376 F. Supp. 579, 585 (E.D. Pa. 1974); *aff'd without opinion*, 511 F.2d 1394 (3d Cir. 1975).

The cases which GAC has cited in support of its position that no independent jurisdictional grounds are required for an application under Section 9 do not justify a different result. Because diversity existed in *Reed & Martin, Inc. v. Westinghouse Electric Corp.*, 439 F.2d 1268, 1276 (2d Cir. 1971), the Second Circuit was not compelled to determine whether, in the absence of diversity, Section 9 conferred jurisdiction. The Fifth Circuit specifically declined to hold diversity was necessary to supply jurisdiction under Section 9 in *City of Naples v. Prepakt Concrete Co.*, 490 F.2d 182, 184 n.6 (5th Cir.), *reh. denied*, 494 F.2d 511 (5th Cir.), *cert. denied*, 419 U.S. 843 (1974).

However, because diversity existed in *City of Naples*, this issue was not before the court. Thus, this case provides no authority for GAC's position that independent jurisdictional grounds are unnecessary under Section 9.

GAC has cited no persuasive authority for its contention that the "plain language" of Section 9 constitutes a conferral of jurisdiction.[1] Therefore, this court agrees with the proposition that the Federal Arbitration Act is a single enacted piece of legislation, and to read Section 9 separately from the other provisions would produce an "odd patchwork of individual statutes bereft of any coherent plan." *Bangor & Aroostook R. Co. v. Maine Central R. Co., supra,* at 263.

Since GAC has alleged no independent grounds to justify an exercise of federal jurisdiction in the instant application, that is, diversity of citizenship or a federal question other than the enforcement of the arbitration agreement, this court has no subject matter jurisdiction to confirm the awards in question and therefore dismisses the application for confirmation. If the United States

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[1] The provisions of the Federal Arbitration Act apply to written clauses in maritime transactions or contracts evidencing a transaction involving commerce. 9 U.S.C. §§ 1, 2. *See generally, Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 (1967); *Bernhardt v. Polygraphic Co.*, 350 U.S. 198 (1956); *Grand Bahama Petroleum Co. v. Asiatic Petroleum Corp.*, 550 F.2d 1320, 1324 (2d Cir. 1977); *Merritt-Chapman & Scott Corp. v. Pennsylvania Turnpike Commission*, 387 F.2d 768, 772 (3d Cir. 1967). If GAC's argument regarding the "plain language" of Section 9 is accepted and carried to its logical extreme, district courts may well be required to entertain all applications for confirmation of awards rendered in their districts irrespective of whether the contracts involved maritime transactions or evidenced transactions involving commerce. This court is unwilling to create such an expansion of federal jurisdiction by declaring that Section 9, by itself, on its face, confers subject matter jurisdiction.

Court of Appeals for the Ninth Circuit determines that this court has jurisdiction under 28 U.S.C. § 1332, in the consolidated appeals pending before it, *United Nuclear Corp. v. General Atomic Co.*, No. 80-5229, and *United Nuclear Corp. v. Gulf Oil Corp.*, No. 80-5369, such jurisdiction would exist in the application for confirmation herein. In that event the merits of the application may be properly brought before this court.

In rendering this decision, the court is not unmindful of the difficulties GAC will encounter in its attempt to obtain confirmation of the arbitration awards. Since this court is the "United States court in and for the district within which such award was made," 9 U.S.C. § 9, an order which effectively divests the court of its jurisdiction over the matter leaves GAC without an alternative remedial option under the Federal Arbitration Act. However, the court is compelled, on the basis of the authorities cited herein, to dismiss the application for lack of subject matter jurisdiction.

DATED: October 24, 1980.

/s/ WILLIAM B. ENRIGHT
William B. Enright, Judge
United States District Court

Copies to:

All parties

APPENDIX C

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Civil No. 80-1585-E

GENERAL ATOMIC COMPANY, *Applicant*,

v.

UNITED NUCLEAR CORPORATION, *Respondent*.

(AAA Case No. 73-10-0078-77)

Filed October 24, 1980

ORDER

This matter has come before the court on General Atomic's (GAC's) application for confirmation of the Partial and Final Arbitration Awards of the Arbitration Panel dated November 14, 1979, and September 10, 1980, respectively, under 9 U.S.C. § 9. In addition, GAC has moved the court for a preliminary injunction to restrain proceedings in the New Mexico state court system on United Nuclear Corporation's (UNC's) motions to vacate the Awards pending the outcome in this matter.

Upon due consideration of the parties' memoranda and exhibits, and the arguments advanced at the hearing, the court hereby dismisses the action for lack of subject matter jurisdiction. If the United States Court of Appeals for the Ninth Circuit determines that this court has jurisdiction under 28 U.S.C. § 1332, in the consolidated appeals pending before it, *United Nuclear Corp. v. General Atomic Co.*, No. 80-5229, and *United Nuclear Corp. v. Gulf Oil Corp.*, No. 80-5369, such jurisdiction would exist in the application for confirmation herein. In that event, the merits of the application may be properly brought before this court.

Further, the court denies GAC's motion for a preliminary injunction because the New Mexico state court action has been removed to a federal district court.

IT IS SO ORDERED.

DATED: October 24, 1980.

/s/ WILLIAM B. ENRIGHT
William B. Enright, Judge
United States District Court

Copies to:

All parties

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-448

GENERAL ATOMIC COMPANY, *Petitioner*

v.

UNITED NUCLEAR CORPORATION

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 30, 1981.

/s/ WILLIAM H. REHNQUIST
Associate Justice of the Supreme Court of the United States

Dated this 30th day of November, 1981

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GENERAL ATOMIC CO., *Appellant,*

vs.

UNITED NUCLEAR CORP., *Appellee.*

Filed November 9, 1981

JUDGMENT

APPEAL from the United States District Court for the Southern District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed. Filed and entered September 8, 1981.

A True Copy. Attest: 30 September 1981.

Clerk of Court
by: /s/ OSCAR LAGLE
Deputy Clerk

Opposition

Office - Supreme Court, U.S.
FILED
JAN 25 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1221

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GENERAL ATOMIC COMPANY,

Petitioner,

v.

UNITED NUCLEAR CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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January 25, 1982

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No. 81-1221

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

GENERAL ATOMIC COMPANY,

Petitioner,

v.

UNITED NUCLEAR CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent United Nuclear Corporation (UNC)[1] respectfully requests that the petition for writ of certiorari be denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are reproduced in Appendix A hereto: the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1976) (pp. A-1 to A-9 *infra*); the Full Faith and Credit Clause of the Constitution, art. IV, § 1 (p. A-9 *infra*); and 28 U.S.C. § 1738 (1976) (p. A-10 *infra*).

[1] United Nuclear Corporation is a subsidiary of UNC Resources, Inc., and has no subsidiaries or affiliates within the meaning of Rule 28.1.

STATEMENT OF THE CASE

General Atomic Company (GAC) seeks review of a decision by the Court of Appeals for the Ninth Circuit which affirmed a dismissal, for lack of subject matter jurisdiction, of GAC's complaint in the United States District Court for the Southern District of California seeking to confirm an arbitration award entered *ex parte* against UNC.

As we shall demonstrate, GAC's petition presents no substantial federal question meriting review by this Court. The ruling below is correct and accords with the unanimous views of all courts that have spoken upon the issue.

Furthermore, other litigation between these parties has established that GAC cannot ultimately prevail in this case, and the results of that other litigation provide additional reasons for denying certiorari. In those other related cases involving the same parties and subject matter: (1) another federal district court has held, in an unreviewable final judgment, that the Federal Arbitration Act does not confer subject matter jurisdiction to review the arbitration award which GAC seeks to have confirmed; (2) a California court of appeal, in a decision which this Court declined to review, has held that *in personam* jurisdiction over UNC did not exist in California in state court proceedings brought by GAC to confirm the arbitration award; and (3) a New Mexico state court, after examining and upholding its jurisdiction, has vacated the arbitration award.

Thus, while the issue presented by GAC is straightforward, that issue is imbedded in a somewhat complex factual history which bears on the propriety of review by this Court. We believe that the following restatement of the case will assist the Court by supplying omissions in GAC's description of the factual background and in rebutting certain of GAC's characterizations of the facts and representations as to the need for review by this Court.

A. The New Mexico Litigation

In 1975, UNC sued GAC in a New Mexico state court, the District Court of Santa Fe County, alleging that a uranium supply contract (the 1973 Supply Agreement) was void as a result of fraud, economic coercion, breach of fiduciary duties, and violations of the New Mexico Antitrust Act. UNC also alleged that commercial impracticability excused its performance. (CR 15, Ex. 3.)[2]

After almost two years of vigorous litigation, in which GAC expressly repudiated in its answer any demand for arbitration under the 1973 Supply Agreement and filed a counterclaim for judicial enforcement of its claimed rights thereunder, and a month after the trial had commenced, GAC for the first time demanded arbitration. It invoked the New Mexico court's jurisdiction under the Federal Arbitration Act by moving, pursuant to 9 U.S.C. § 3, for a stay of proceedings pending arbitration. (CR 15, Ex. 11.) GAC's motion was denied in a partial final judgment holding that GAC had waived any right to arbitrate and that, in any event, no issues were arbitrable as they consisted either of nonarbitrable antitrust issues or were inextricably intertwined therewith. (CR 15, Exs. 11-12.) On May 7, 1979, that judgment was affirmed on appeal, *United Nuclear Corp.* v. *General Atomic Co.*, 93 N.M. 105, 597 P.2d 290 (1979), and this Court denied GAC's petition for writ of certiorari, 444 U.S. 911 (1979).

In the meantime, in proceedings arising out of the New Mexico litigation, this Court had ruled that the Supremacy Clause prevents State courts from enjoining a party from initiating subsequent *in personam* actions in federal forums or

[2] Citations in the form "CR...." are to the numbered documents in the Clerk's Record of the appeal in the Ninth Circuit.

invoking federal rights including, arbitration. *General Atomic Co.* v. *Felter*, 434 U.S. 12 (1977) (*"Felter I"*); *General Atomic Co.* v. *Felter*, 436 U.S. 493 (1978) (*"Felter II"*). However, this Court also specifically rejected GAC's contention, on petition for writ of mandamus, that the New Mexico court's nonarbitrability judgment conflicted with *Felter I*, because:

> "Clearly, our prior opinion [in *Felter I*] did not preclude the [trial] court from making findings concerning whether GAC had waived any right to arbitrate or whether such a right was contained in the relevant agreements. Nor did our prior decision prevent the Santa Fe court, on the basis of such findings, from declining to stay its own trial proceedings as requested by GAC pending arbitration in other forums." 436 U.S. at 496-97.

While its ruling on arbitrability was on appeal, the New Mexico trial court proceeded with the trial and, in April 1978, entered a judgment which declared "[t]he 1973 Uranium Supply Agreement * * * is null, void, unenforceable and of no effect whatever" and "performance thereunder is excused." (CR 15, Ex. 19, pp. 1-2, paragraph A.) GAC appealed the trial court judgment. On August 29, 1980, in a 199-page opinion, the New Mexico Supreme Court affirmed the judgment in all material respects. *United Nuclear Corp.* v. *General Atomic Co.*, 96 N.M. 155, 629 P.2d 231 (1980). GAC appealed to this Court seeking review not only of the New Mexico Supreme Court's August 29, 1980 decision but also of that court's May 7, 1979 arbitrability decision, insofar as the latter decision had rejected GAC's argument that this Court's *Felter* decisions had been violated. This Court dismissed GAC's appeal for want of jurisdiction and, treating the papers whereon the appeal was taken as a petition for writ of certiorari, denied certiorari. *General Atomic Co.* v. *United Nuclear Corp.*, No. 80-1360, 49 U.S.L.W. 3787 (April 20, 1981), *rehearing denied*, 49 U.S.L.W. 3912 (June 8, 1981). Thus, the judgments affirmed by

the May 7, 1979 and the August 29, 1980 decisions of the New Mexico Supreme Court are final for all purposes.[3]

B. The Arbitration Proceedings

Although arbitration of the 1973 Supply Agreement disputes had never been ordered by any court and GAC had never petitioned any court for such an order pursuant to 9 U.S.C. § 4, two months after the *Felter II* decision and while the arbitrability issue was pending in the New Mexico Supreme Court, the American Arbitration Association (AAA) notified UNC that it would proceed with the arbitration demanded by GAC. (CR 15, Ex. 31.)

Barred by *Felter II* from obtaining state court relief against the then-impending arbitration, UNC filed an action against the AAA in the United States District Court for the District of New Mexico, seeking an injunction against the arbitration. That court dismissed the complaint on the grounds that GAC was an indispensable party whose joinder would destroy diversity jurisdiction and that there was no federal question jurisdiction. (CR 15, Exs. 32 and 35.)

Thereafter, UNC, having previously objected to the initiation of the arbitration proceeding and its locale, appeared before the arbitration panel under repeated protests and for the limited

[3] In its May 7, 1979 decision affirming the state court judgment that GAC had waived any right to arbitrate and that the dispute was in any event inarbitrable, the New Mexico Supreme Court specifically rejected GAC's argument that the trial court judgment was inconsistent with *Felter I* and *Felter II*. 597 P.2d at 309. That argument was pressed in GAC's petition for writ of certiorari seeking review of the May 7, 1979 decision, denied by this Court at 444 U.S. 911 (1979). It was pressed again in GAC's unsuccessful appeal to this Court after the August 29, 1980 decision of the New Mexico Supreme Court (No. 80-1360, *supra*). Thus, even though the New Mexico court lacked the power to enjoin the arbitration proceedings, as this Court held in *Felter II*, it can no longer be controverted that GAC waived any right to arbitration that it may have had and that the dispute, in any event, was not arbitrable.

purpose of arguing that the panel had no jurisdiction to proceed because of the outstanding New Mexico judgments. (*E.g.*, CR 15, Exs. 33, 36, 40, 41.) When the arbitrators decided to proceed on nonjurisdictional issues, UNC immediately withdrew from the proceeding and filed the first of two actions in the United States District Court for the Southern District of California seeking to enjoin the arbitration. In its initial complaint, UNC sued GAC, the AAA, and the arbitrators, alleging federal question jurisdiction under 28 U.S.C. § 1331, based on the Full Faith and Credit Clause and 28 U.S.C. § 1738.[4] That complaint, as amended to allege diversity jurisdiction as well, was dismissed by Judge Enright for lack of subject matter jurisdiction on February 1, 1980. (CR 15, Exs. 46 and 51.)[5] UNC then filed a second action (No. 80-0339-E) against Gulf alone. The District Court dismissed that action on the ground that GAC was an indispensable party whose joinder would destroy diversity.

On November 14, 1979, a majority of the arbitration panel issued a partial award concluding that the New Mexico judgments "are not res judicata and they are not entitled to full faith and credit" (CR 1, Ex. C, p. 28) and that GAC had not waived its arbitration rights. *Id.* 27-38. Without UNC's participation, and in the absence of a UNC-designated arbitrator, the two remaining arbitrators proceeded with hearings with only GAC in attendance and, on September 10, 1980, issued a final award. (CR 1, Ex. E.) In that award, the two remaining arbitrators accepted GAC's *ex parte* case of contract breach, purported to pass upon UNC's antitrust claims and concluded that there was no showing of an antitrust violation, awarded damages to GAC in the amount of $301,181,635, and

[4] In that case, GAC argued, directly contrary to the arguments it makes here, that "suits involving the application of the Federal Arbitration Act do not furnish an independent basis of jurisdiction." See pp. 11-12 *infra*.

[5] The court's opinion of that date and its prior opinion, dated July 2, 1979, rejecting UNC's claim of federal-question jurisdiction, have not been reported.

ordered UNC to specifically perform certain provisions of the 1973 Supply Agreement amounting to delivery of over 15 million pounds of uranium concentrates to GAC.

C. Proceedings to Vacate or Confirm the Arbitration Awards

On June 9, 1980, UNC filed a First Petition for Supplemental Relief in the New Mexico trial court seeking to vacate the Partial Award. On September 15, 1980, UNC filed a Second Petition for Supplemental Relief seeking vacation of the arbitrators' Final Award. Shortly thereafter, GAC removed these proceedings to the United States District Court for the District of New Mexico, alleging that UNC's efforts to vacate the arbitration awards created federal question jurisdiction pursuant to the Federal Arbitration Act and 28 U.S.C. §§ 1331 and 1337.

On September 12, 1980, GAC filed an application in the United States District Court for the Southern District of California to confirm the Final Award (Case No. 80-1585-E). GAC alleged that the District Court had federal question jurisdiction under Section 9 of the Federal Arbitration Act, 9 U.S.C. § 9. (CR 1.) On October 24, 1980, Judge Enright for that court issued a memorandum decision dismissing GAC's application for confirmation of the arbitration awards on the ground that the Federal Arbitration Act did not provide an independent basis for federal jurisdiction. (Pet. App. 10a-15a.) GAC's instant petition arises from that order of dismissal and its affirmance by the Ninth Circuit.

On the same day that its federal action was dismissed, GAC filed an application to confirm the arbitration awards, under 9 U.S.C. § 9, in the Superior Court of the State of California for the County of San Diego. UNC, appearing specially, moved to dismiss the proceeding for lack of *in personam* jurisdiction. After

the trial court denied that motion, UNC petitioned the Court of Appeal of the State of California, Fourth Appellate District, for a peremptory writ of mandate. On December 16, 1980, that court filed its opinion and judgment letting "a peremptory writ of mandate issue * * * directing the superior court to dismiss [that] action." *United Nuclear Corp.* v. *Superior Court for the County of San Diego*, 113 Cal. App. 3d 359, 169 Cal. Rptr. 827. (App. B, p. B-3 *infra*.)

The California court of appeal rejected GAC's argument that personal jurisdiction could be based upon the arbitration clause in the 1973 Supply Agreement, since the decisions of the New Mexico courts holding that agreement to be void "are entitled to full faith and credit," and concluded that the record did not otherwise "reveal a sufficient basis to establish personal jurisdiction" over UNC (p. B-2 *infra*). In addition, the court held that, even if the California courts had jurisdiction over UNC, "the doctrine of forum non conveniens would require, at minimum, a stay of the action here, in order to permit the pending action in the Santa Fe district court in New Mexico, in which the arbitration award is challenged, to proceed to judgment;" and further, that "even if that action were not pending, the courts of New Mexico are obviously the more suitable forums to determine these issues with which they are intimately familiar" (p. B-2 *infra*). The California Supreme Court denied GAC's petition for hearing on February 18, 1981, and on October 5, 1981, this Court denied GAC's petition for writ of certiorari. *General Atomic Co.* v. *United Nuclear Corp.*, No. 80-2106, 50 U.S.L.W. 3250, *rehearing denied*, 50 U.S.L.W. 3448 (Nov. 30, 1981).

On December 11, 1980, the United States District Court for the District of New Mexico granted UNC's motion to remand the New Mexico proceedings seeking vacation of the arbitration awards (App. C, p. C-3 *infra*). After an independent analysis of

the applicable law, Judge Bratton agreed with Judge Enright of the Southern District of California that the Federal Arbitration Act does not afford a basis for federal subject matter jurisdiction. Following the remand, Judge Musgrove for the New Mexico trial court concluded that it had jurisdiction to review the arbitration awards under § 10 of the Federal Arbitration Act, 9 U.S.C. § 10, and vacated those awards as being "illegal, void and of no effect" on the grounds, *inter alia*, that the prior judgments of the New Mexico courts were *res judicata*, that the arbitrators had exceeded their jurisdiction and powers and that they had acted in manifest disregard of the law (App. D *infra*). Notwithstanding GAC's prior appeal of that judgment to the New Mexico Supreme Court, which has now been briefed and argued, GAC petitioned this Court for a writ of mandamus to vacate that decision, again asserting that the action of the New Mexico court violated this Court's *Felter* decisions. That petition was denied on October 5, 1981. *In re General Atomic Co.*, No. 80-2107, 50 U.S.L.W. 3250.

On September 8, 1981, the Ninth Circuit issued its decision which is the subject of GAC's instant petition (Pet. App. 1a). Noting that "federal courts are courts of limited jurisdiction" and that a contrary decision "would work great mischief to the overall scheme of the Arbitration Act" (Pet. App. 2a) the Ninth Circuit joined the other courts that unanimously hold that the Arbitration Act does not confer subject matter jurisdiction upon a federal court. Prior to that decision, UNC filed with the Ninth Circuit a Motion to Affirm or Dismiss the Appeal for reasons independent of the merits of the District Court's decision (see pp. 23-25 *infra*). Argument on that motion was heard together with argument on the merits, but the Ninth Circuit did not reach or decide the grounds asserted by UNC in the motion.

INTRODUCTION AND SUMMARY OF ARGUMENT

The rulings by the courts below that the Federal Arbitration Act, by itself or in conjunction with 28 U.S.C. § 1331, does not confer subject matter jurisdiction upon the federal courts conform with the unanimous views of the courts that have spoken upon that issue. That is true with respect to proceedings to confirm an arbitration award under § 9, to vacate such an award under § 10, or to modify an arbitration award under § 11, as well as with respect to proceedings invoking other provisions of the Act. Those decisions, including the judgment below, are supported by the structure and history of the Act, and they accord with the language and purpose of the Act and with common sense. Hence, there is no conflict of decisions, no important issue of federal law which should be, but has not been, decided by this Court, and no other substantial reason to grant certiorari.

Moreover, in other litigation between the parties: (1) the United States District Court for the District of New Mexico also ruled that the Federal Arbitration Act does not confer subject matter jurisdiction of proceedings to review the arbitration awards in question; (2) a California state appeals court held that personal jurisdiction over UNC does not exist in California with respect to a proceeding to review those arbitration awards and that New Mexico judgments declaring the dispute inarbitrable and the 1973 Supply Agreement (which includes the arbitration clause) to be void are entitled to full faith and credit; and (3) a New Mexico state court examined and upheld its jurisdiction and vacated those arbitration awards. Those decisions are *res judicata* as to the issues so decided; they provide independent grounds for the dismissal of GAC's action to confirm the arbitration awards, although the Ninth Circuit did not reach UNC's motion to dismiss on that basis; and they constitute additional reasons why certiorari should be denied.

ARGUMENT

A. All Relevant Authorities Support the Decision that the Federal Arbitration Act Does Not Afford A Basis for Federal Subject Matter Jurisdiction

Although this Court "has not ruled on the point, the lower courts that have are in agreement that the Arbitration Act is not itself a grant of jurisdiction and that there must be some independent basis of jurisdiction." Wright, Miller & Cooper, 13 *Federal Practice and Procedure* § 3569 at 468 (1975). In a prior proceeding in Judge Enright's court brought by UNC to enjoin the arbitration (see p. 6 *supra*), GAC itself urged that:[6]

> "There is simply no authority for UNC's implication that jurisdiction is conferred because it alleges that a 'federal question' has been stated arising under the Federal Arbitration Act. There is no specific authorization in the Act for an action to *enjoin* arbitration proceedings. The Act itself (Section 4) states that petitions to *compel* arbitration may be brought in 'United States District Courts which, *save for such agreement*, would have jurisdiction under Title 28 . . . .' (Emphasis added [by GAC]). The Second Circuit has read this language, together with the Act as a whole, to reflect a Congressional intent to 'prevent the federal courts from becoming unduly ensnarled in this far reaching law.' *Robert Lawrence* v. *Devonshire Fabrics, Inc.*, 271 F.2d 402 at 408 (2d Cir. 1959), *cert. denied [sic;* dismissed], 364 U.S. 801. Thus, it concluded that suits involving the application of the Federal Arbitration Act do not furnish an independent basis for federal jurisdiction

[6] GAC's Points and Authorities in Support of Motion to Dismiss under Rule 12 Fed. R. Civ. P., filed April 23, 1979, in *United Nuclear Corporation* v. *General Atomic Company, et al.*, Case No. 79-0329-E (S.D. Cal.) (CR 15, Ex. 44, at 9-10).

> under 28 U.S.C. Section 1331. *Id.* See also, *Commercial Metals Co.* v. *Balfour, Guthrie and Co., Ltd.*, 577 F.2d 264 (5th Cir. 1978); *Metro Industrial Painting Corp.* v. *Terminal Construction Co.*, 287 F.2d 382 (2d Cir. 1961), *cert. denied sub nom. [sic].*"

District Judge Enright accepted that argument, which UNC could not and did not attempt to controvert,[7] stating, among other things, that:[8]

> "Courts which have considered the matter have concluded that the Federal Arbitration Act does not furnish an independent basis of jurisdiction. Jurisdiction must exist apart from the arbitration controversy . . . ."

Hence, in dismissing GAC's instant action for lack of federal question jurisdiction, Judge Enright simply applied a principle which he had previously acknowledged, at the urging of GAC and without contradiction by UNC, in similarly dismissing an action brought by UNC.

While § 9 of the Federal Arbitration Act, unlike §§ 3 and 4, does not contain an express requirement of an independent basis for federal jurisdiction, the "Arbitration Act was enacted as a single, comprehensive statutory scheme" so that the jurisdictional limitations in one provision are applicable also to the others. *Commercial Metals Co.* v. *Balfour, Guthrie & Co., Ltd.*, 577 F.2d 264, 268-69 (5th Cir. 1978). See also, *e.g.*, *Robert Lawrence Company* v. *Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. dismissed*, 364 U.S. 801 (1960). This Court

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[7] UNC had urged (unsuccessfully) that the District Court had jurisdiction under 28 U.S.C. § 1331, on the ground that its action arose under the Full Faith and Credit Clause and 28 U.S.C. § 1738.

[8] Memorandum Decision, July 2, 1979, in Case No. 79-0329-E (CR 15, Ex. 46, at 2).

so recognized in *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198 (1956), in rejecting a contention that § 3 of the Act stands on its own footing" so that, "while § 2 makes enforceable arbitration agreements in maritime transactions and in transactions involving commerce, § 3 covers all arbitration agreements even though they do not involve maritime transactions or transactions in commerce." 350 U.S. at 201. "We disagree with that reading of the Act. Sections 1, 2 and 3 are integral parts of a whole." *Ibid.* So, too, §§ 3, 4, 9, 10 and 11 "are integral parts of a whole" and thus subject to the same jurisdictional limitations.

In sum, as *Bangor and Aroostock R. Co.* v. *Maine Central R. Co.*, 359 F. Supp. 261, 263-64 (D.D.C. 1973), concluded in rejecting a contention that § 9 "should be read separately from the other provisions of the Arbitration Act":

> ". . . this reasoning would render the Arbitration Act — enacted as a single coordinated piece of legislation in February, 1925 — little more than an odd patchwork of individual statutes, bereft of any coherent plan. The [plaintiff's] reasoning would lead to the conclusion that an independent basis for subject matter jurisdiction must exist when applying for an order to stay a law suit pending arbitration (Section 3) and for an order directing the parties to proceed to arbitration (Section 4), but not for the entry of judgment following the granting of the award (Section 9). The Court is at a loss to define a federal policy which would require independent federal jurisdiction in the two former instances and not in the latter. The Court holds, accordingly, that the only logical interpretation of the Arbitration Act as a whole is that it does not itself confer independent federal jurisdiction."

Accord, *Knox County Hospital Association et al.* v. *Pathman Construction Company et al.*, No. 81 C 0650 (N.D. Ill., September 11, 1981), which also dismissed an application under § 9 to confirm an award.

Other lower courts have consistently recognized that an independent basis of federal jurisdiction is necessary in cases invoking § 9 or the other review provisions in §§ 10 and 11 of the Arbitration Act as well as in cases invoking other provisions of that Act. *Sine* v. *Local No. 992 Intern. Broth., Etc.*, 644 F.2d 997, 1001 n.9 (4th Cir.), *cert. denied*, Nos. 81-314 and 81-475, 50 U.S.L.W. 3351 (Nov. 2, 1981) (§ 10); *Reed & Martin, Inc.* v. *Westinghouse Electric Co.*, 439 F.2d 1268, 1275-76 (2d Cir. 1971) (§ 9); *Monte* v. *Southern Delaware County Authority*, 321 F.2d 870, 873-74 (3d Cir. 1968) (§§ 9-11); *Ballantine Books, Inc.* v. *Capital Distributing Co.*, 302 F.2d 17, 19 (2d Cir. 1961) (§ 9); *Mengel Co.* v. *Nashville Paper Prod. & Spec. Wkrs. Union*, 221 F.2d 644, 648 (6th Cir. 1955) (§ 10); *In re Woerner*, 31 F.2d 283, 284 (2d Cir. 1929) (§ 9); *NII Metals Service, Inc.* v. *ICM Steel Corp.*, 514 F. Supp. 164, 166 (N.D. Ill. 1981) (§ 9); *Williams* v. *Beyer*, 455 F. Supp. 482, 484 (D.N.H. 1978) (§§ 9 and 10); *Paul Allison, Inc.* v. *Minikin Storage of Omaha*, 452 F. Supp. 573, 574 (D. Minn. 1978) (§ 9); *S. J. Groves & Sons* v. *American Arbitration Ass'n*, 452 F. Supp. 121, 123 (D. Minn. 1978) (§ 10); *Paley Assoc., Inc.* v. *Universal Woolens, Inc.*, 446 F. Supp. 212, 213 n.1 (S.D.N.Y. 1978) (§ 9); *Middlebury Associates* v. *R. E. Bean Const.*, 446 F. Supp. 28, 29 (D. Vt. 1977) (§ 10); *Litton RCS, Inc.* v. *Pennsylvania Turnpike Commission*, 376 F. Supp. 579, 585 (E.D. Pa. 1974), *aff'd without opinion*, 511 F.2d 1394 (3d Cir. 1975) (§ 9); *Royal Industrial Union, Local 937* v. *Royal McBee Corp.*, 217 F. Supp. 277, 278 (D. Conn. 1963) (§ 11); *Victorias Milling Co.* v. *Hugo Neu Corporation*, 196 F. Supp. 64, 69-70 (S.D.N.Y. 1961) (§§ 9 and 10).[9]

[9] Among the many cases that, while involving provisions of the Act other than §§ 9-11, recognize the general proposition that the Arbitration Act itself does not afford a basis of federal subject-matter jurisdiction are: *Jett* v. *Zink*,

There are no decisions to the contrary. GAC's assertion (Pet. at 12) that the decision below "conflicts with an alternative holding of the Second Circuit in *Reed & Martin, Inc.* v. *Westinghouse Electric Corp.*, 439 F.2d 1268 (2d Cir. 1971)," is erroneous. In that case, immediately prior to the first sentence from its opinion quoted by GAC (Pet. at 12),[10] the Second Circuit specified that it had diversity jurisdiction. It followed the sentence quoted by GAC with a direction to "See *Ballantine Books, Inc., supra,*" in which the Second Circuit had concluded that "the diversity of citizenship of the parties gave the independent federal jurisdiction which we have held is required under the Act . . . " (302 F.2d at 19). And, the Second Circuit followed the second sentence from its opinion quoted by GAC (Pet. at 13) with the explanation that its *Robert Lawrence* opinion "does not indicate otherwise" as that "case holds specifically that 'the rights thus created are to be adjudicated by the federal courts whenever such courts have subject matter jurisdiction, including diversity cases * * *' (271 F.2d at 409)."[11] Hence, *Reed & Martin, Inc.* is merely one of several decisions in which the Second Circuit has recognized that an independent

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474 F.2d 149, 156 n.12 (5th Cir.), *cert. denied*, 414 U.S. 854 (1973); *Collins Radio Company* v. *Ex-Cell-O Corporation*, 467 F.2d 995, 996 n.1 (8th Cir. 1972); *Metro Industrial Painting Corp.* v. *Terminal Const. Co.*, 287 F.2d 382, 384 (2d Cir.), *cert. denied*, 368 U.S. 817 (1961); *Amalgamated Ass'n. Etc.* v. *Southern Bus Line*, 189 F.2d 219, 221-22 (5th Cir. 1951); *Krauss Bros. Lumber Co.* v. *Louis Bossert & Sons*, 62 F.2d 1004 (2d Cir. 1933); as well as numerous district court opinions.

[10] GAC's quotation of that sentence is incomplete, omitting the concluding phrase "9 U.S.C. §§ 1-14." Clearly, the Second Circuit did not intend to suggest differing jurisdictional standards between 9 U.S.C. § 4 and § 9, as GAC argues at length (Pet. at 9-12).

[11] The conclusion by the Second Circuit in *Robert Lawrence Company* v. *Devonshire Fabrics, Inc., supra*, 271 F.2d at 408, that "suits involving the application of the Federal Arbitration Act do not furnish an independent basis of federal jurisdiction under 28 U.S.C. § 1331," was correctly said by GAC in its opening brief filed with court below (p. 27, n.16) to be the "one that is most frequently cited as support for the proposition that an 'independent basis' is needed under the Federal Arbitration Act to support federal jurisdiction."

basis of federal jurisdiction, such as diversity, is necessary in suits under the Federal Arbitration Act. Indeed, in its opening brief filed with the court below (at p. 26), GAC cited *Reed & Martin, Inc.* and another case for the proposition that two courts of appeals "have adverted to the precise issue presented here and have indicated — without deciding it squarely — that federal question jurisdiction exists under Section 9." While that proposition is equally erroneous, it is at least more modest than GAC's present assertion.[12]

The decision below accords with the unanimous views of all courts that have decided the issue, as well as with the views that GAC itself urged in prior litigation before the same district judge. In these circumstances, GAC plainly must bear a very heavy burden in attempting to persuade this Court to grant certiorari, and as we show below, it has not carried that burden.

Among other things, the Second Circuit there relied upon its prior decision *In re Woerner, supra*, which had dismissed for lack of jurisdiction a petition to confirm an arbitration award, and the decision by the Sixth Circuit in *Mengel Co.* v. *Nashville Paper Prod. & Spec. Wkrs., supra*, which also had dismissed a petition to vacate an arbitration award for lack of jurisdiction, as well as "upon consideration of the Act as a whole . . ." (271 F.2d at 408). *Robert Lawrence* was cited by the Second Circuit in *Ballantine Books, Inc.* for the proposition that "independent federal jurisdiction . . . is required" in a § 9 proceeding to confirm an award (302 F.2d at 19). See also *Metro Industrial Painting Corp.* v. *Terminal Const. Co., supra*, 287 F.2d at 384.

[12] The other case cited for that proposition was *City of Naples* v. *Prepakt Concrete Company*, 490 F.2d 182, 184 n.6 (5th Cir.), *subsequent opinion*, 494 F.2d 511 (5th Cir.), *cert. denied*, 419 U.S. 843 (1974), which GAC also refers to in its Petition (p. 13). While the Fifth Circuit in that case did "not hold that diversity and amount in controversy were necessary to confer jurisdiction under § 9, but only note[d] that in this case they were present," that Court also did not even refer to some other possible basis of jurisdiction much less indicate in any way its views in regard to the issue in this case. Furthermore, in a later case, *Commercial Metals Co.* v. *Balfour, Guthrie & Co., Ltd., supra*, 577 F.2d at 269, not even cited by GAC, the Fifth Circuit unmistakeably "join[ed] the other courts which have considered the matter, and have required an independent jurisdictional basis, . . . and have refused to fragment the Arbitration Act," citing with approval *Bangor and Aroostock R. Co.* v. *Maine Central R. Co., supra* (577 F.2d at 269).

B. Neither the Language of Section 9 Nor the Other Considerations Urged by GAC Support Its Position

GAC's principal reliance is placed upon what it asserts to be the "plain language" of Section 9 (Pet. at 7-9), insofar as that section provides that, if the parties in their agreement have not specified the court in which to apply for a confirmation order, "such application may be made to the United States court in and for the district within which such award was made." 9 U.S.C. § 9. No court has regarded that language, or similar language in §§ 10 and 11, as conferring subject matter jurisdiction upon the federal courts, and for good reason. That language on its face sounds in venue rather than subject matter jurisdiction. This is readily confirmed by comparing the language of § 9 with the jurisdictional provisions in Chapter 85 of the Judicial Code (28 U.S.C. §§ 1330-1363) and with the venue provisions in Chapter 87 of the Judicial Code (28 U.S.C. §§ 1391-1407). The language on its face relates to an appropriate federal court in which to file a confirmation application when the federal courts have subject matter jurisdiction, rather than to the creation of subject matter jurisdiction in a particular federal court. See, *e.g.*, *White Motor Corp.* v. *International U., U.A., A. & A.I.W.*, 491 F.2d 189, 190-91 (2d Cir. 1974); *International Union, Etc.* v. *White Motor Corporation*, 374 F. Supp. 421, 423 (D. Minn. 1973), *aff'd*, 505 F.2d 1193 (8th Cir. 1974).

This Court construed an even "plainer" provision to relate to venue, rather than jurisdiction, in *Panama R. Co.* v. *Johnson*, 264 U.S. 375 (1924). The Jones Act (now 46 U.S.C. § 688) provided that: "Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." In holding that provision to relate to venue, rather than subject matter jurisdiction, this Court stated (264 U.S. at 384-85) that:

> "Although not happily worded, the provision, taken alone, gives color to the [jurisdictional] contention. But as a

general rule, where existing legislation on a particular subject has been systematically revised and restated in a comprehensive general statute, such as the Judicial Code, subsequent enactments touching that subject are construed and applied in harmony with the general statute, save as they clearly manifest a different purpose. An intention to depart from a course or policy thus deliberately settled is not lightly to be assumed. The rule is specially pertinent here. Beginning with the Judiciary Act of 1789, Congress has pursued the policy of investing the federal courts . . . with a general jurisdiction expressed in terms applicable alike to all of them and of regulating the venue by separate provisions designating the particular district in which a defendant shall be sued . . . . This policy was carried into the Judicial Code, and is shown in §§ 24 [now Chapter 85] and 51 [now Chapter 87], one embodying general jurisdictional provisions applicable to rights under subsequent laws as well as laws then existing, and the other containing particular venue provisions. A reading of the provision now before us with those sections, and in the light of the policy carried into them, makes it reasonably certain that the provision is not intended to affect the general jurisdiction of the District Courts as defined in § 24, but only to prescribe the venue for actions brought under the new act of which it is a part. No reason why it should have a different purpose has been suggested, nor do we perceive any. Its use of the word 'jurisdiction' seems inapt, and therefore not of special significance. The words 'shall be' are stressed by the defendant, but as they are found also in the earlier provisions which uniformly have been held to relate to venue only, they afford no ground for distinction."

See also, *e.g.*, *Hoiness* v. *United States*, 335 U.S. 297, 301-02 (1948); *Bainbridge* v. *Merch. & Miners Co.*, 287 U.S. 278, 280 (1932).[13]

It follows *a fortiori* from *Panama R. Co.*, that the language in § 9 of the Arbitration Act upon which GAC relies relates to venue rather than subject matter jurisdiction. That Act was enacted less than a year after *Panama R. Co.*, was decided; the portion of § 9 upon which GAC relies does not even use the word "jurisdiction;" it uses the words "may be" rather than "shall be" in referring to the district in which an application "may be made;" and on its face it is not a general jurisdictional provision applicable to all federal district courts, but rather designates a district in which a defendant may be sued when federal subject matter jurisdiction otherwise exists. Hence, the aspects of the Jones Act which gave this Court some difficulty in *Panama R. Co.* are not present in § 9 of the Arbitration Act, and all the reasons why the Court in that case nonetheless construed the Jones Act as relating only to venue support a similar construction of § 9. Moreover, GAC has not even contended — either here or below — that the legislative history of the Arbitration Act supports GAC's interpretation of § 9.[14]

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[13] In the *Bainbridge* case, this Court reiterated its *Panama R. Co.* holding that the Jones Act provision related to venue, and went on to hold that it did not control the venue of suits under the Jones Act brought in state courts as "the correct construction of the provision limits it to the courts of the United States." 287 U.S. at 280-81.

[14] For the legislative history, see *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearings on S. 4213 and S. 4214 Before A Subcomm. of the Senate Judiciary Comm.*, 67th Cong., 4th Sess. (1923); *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 & H.R. 646 Before Subcomms. of the House and Senate Judiciary Comms.*, 68th Cong., 1st Sess. (1924); H.R. Rep. No. 96, 68th Cong., 1st Sess. (1924); S. Rep. No. 536, 68th Cong., 1st Sess. (1924); 65 Cong. Rec. 1931, 11080-82 (1924); 66 Cong. Rec. 984, 2759-62, 3303-04 (1924-25). "An arbitration agreement is placed [by the Act] upon the same footing as other contracts, where it belongs." H.R. Rep. No. 96, *supra*, at 1. GAC's argument would place arbitration contracts on a very different jurisdictional footing than that applicable to other commercial contracts.

GAC's effort to draw sustenance from a comparison of §§ 4 and 9 of the Act (Pet. at 9-11) has already been refuted (pp. 11-14, *supra*) as has GAC's claim (Pet. at 12-13) of a conflict of decisions (pp. 15-16, *supra*). GAC's attempt to justify an interpretation that would make the Arbitration Act a "patchwork of individual statutes bereft of any coherent plan" (Pet. at 11-12) is equally unavailing. The assertion that it "is entirely sound and coherent to deny federal courts independent authority to compel a future arbitration but to empower them to confirm, vacate or modify arbitration awards which have been issued" (Pet. at 11) is purely an assertion of GAC's counsel without any cited or other support of which we are aware. By contrast, Professor Wright's treatise agrees that "there is force to the argument that to require independent jurisdictional grounds under Sections 3 and 4 but not under Section 9 'would render the Arbitration Act — enacted as a single, coordinated piece of legislation in February, 1925 — little more than an odd patchwork of individual statutes, bereft of any coherent plan.' " Wright, Miller & Cooper, *supra*, § 3569 at 468-69. See also pp. 11-14 *supra*.[15] Indeed, the evils that the Act was intended to correct were principally that courts would not enforce arbitration agreements in equity by compelling a party to arbitrate and that arbitration agreements were revocable at any time before an award.[16] If a federal court had been deemed necessary to fulfill some but not all of the provisions of the Act, it is unlikely that §§ 9-11 would have been chosen rather than §§ 3 and 4 which are the provisions primarily directly towards remedying those evils.

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[15] As is clear from the face of § 4, proceedings thereunder ordinarily are summary in nature (see, *e.g.*, *Intern. U. of Operating Engineers* v. *Carl A. Morse*, 529 F.2d 574, 581 (7th Cir. 1976)), so that the alleged 'summary . . . nature' of § 9 proceedings, even if true, affords no grounds for a distinction, and both sections establish their own federal standards (see Pet. at 11).

[16] See *e.g.*, S. Rep. No. 536, *supra*, at 2; H.R. Rep. No. 96, *supra*, at 1-2; Joint Hearings on S. 1005 & H.R. 646, *supra*, at 14-19, 25, 34-35. That is, the common law doctrines of revocability and unenforceability — which the Federal Arbitration Act and the Uniform Arbitration Act were intended to eliminate — did not prevent an action based upon an executed arbitration award. See, *e.g.*, Sturges & Murphy, *Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act*, 17 Law & Contemp. Prob. 580, 581-82 n.2 (1952).

GAC's efforts to inflate the importance of the decision below (Pet. at 13-17) ignore the fact that the decision simply applied a well established interpretation of the Arbitration Act which has existed for over fifty years, and thus in no way changed the situation under that Act. See *In re Woerner, supra,* 31 F.2d at 284. Moreover, it is clear that the state courts have the jurisdiction, and indeed the duty, to enforce and apply the Federal Arbitration Act to contracts subject to that Act. *Commercial Metals Co.* v. *Balfour, Guthrie & Co., Ltd., supra,* 577 F.2d at 269; *Coastal States Gas Producing Co.* v. *Producing Properties,* 203 F. Supp. 956, 959 (S.D. Tex. 1962).[17] And see, *e.g., Robert Lawrence Company* v. *Devonshire Fabrics, Inc., supra,* 271 F.2d at 404-09. Even when a federal court has independent subject matter jurisdiction, that jurisdiction is concurrent with the jurisdiction of the state courts. *Victorias Milling Co.* v. *Hugo Neu Corporation, supra,* 196 F. Supp. at 70; *Cocotos Steamship Co. of Panama, S.A.* v. *Hugo Neu Corp.,* 178 F. Supp. 491, 492 (S.D.N.Y. 1959). Thus, the New Mexico Supreme Court applied the Federal Arbitration Act and federal decisions thereunder in affirming a denial of GAC's motion for a stay of judicial proceedings pending arbitration,[18] and the New Mexico trial court applied the standards prescribed in § 10 of that Act in vacating the arbitration awards.[19]

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[17] Some of the more recent state court decisions applying the Federal Arbitration Act include: *Dean Witter Reynolds, Inc.* v. *Roven,* 94 N.M. 273, 609 P.2d 720 (1980); *White-Weld & Co., Inc.* v. *Mosser,* 587 S.W.2d 485, 487-88 (Tex. Civ. App. 1979), *cert. denied,* 446 U.S. 966 (1980); *Episcopal Housing Corp.* v. *Federal Ins. Co.,* 269 S.C. 631, 239 S.E.2d 647, 650 (1977); *Main* v. *Merrill, Lynch, Pierce, Fenner and Smith, Inc.,* 67 Cal. App. 3d 19 (1977); *Pathman Const. Co.* v. *Knox County Hospital Assn.,* 164 Ind. App. 121, 326 N.E.2d 844, 849-52 (1975); *A/S J. Ludwig Mowinckels Rederi* v. *Dow Chemical Co.,* 25 N.Y.2d 576, 307 N.Y.S.2d 660, 255 N.E.2d 744, *cert. denied,* 398 U.S. 939 (1970). See also, *e.g.,* Wright, Miller & Cooper, *supra,* § 3569 at 470 n.14 and cases there cited.

[18] *United Nuclear Corp.* v. *General Atomic Co., supra,* 597 P.2d at 298-302, 309-13.

[19] See App. D, *infra.*

Finally, GAC's assertion that the New Mexico courts have been "hostile to this arbitration from the beginning" (Pet. at 15) is entirely inappropriate. The fact that this Court in the *Felter* cases concluded that the New Mexico courts had erred in regard to the requirements of the Supremacy Clause or in interpreting a prior mandate does not convict them of "hostility" to anything, and this Court in the *Felter* cases made no such suggestion. "State judges as well as federal judges swear allegiance to the Constitution of the United States, and there is no reason to think that because of their frequent differences of opinion as to how that document should be interpreted that all are not doing their mortal best to discharge their oath of office." *Sumner* v. *Mata*, 449 U.S. 539, 549 (1981). In concluding that GAC had waived any right to arbitrate and that the controversy was inarbitrable in any event as it was entwined with inarbitrable antitrust issues, the New Mexico courts applied the Federal Arbitration Act and federal decisions construing that Act, and this Court saw no reason to review their decision. See p. 3 *supra*. Indeed, the New Mexico Supreme Court expressly recognized the "strong federal policy favoring the enforcement of arbitration agreements,"[20] and New Mexico has adopted the Uniform Arbitration Act which generally is comparable to the Federal Arbitration Act and evinces a state policy favorable to arbitration.[21]

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[20] *United Nuclear Corp.* v. *General Atomic Co.*, *supra*, 597 P.2d at 299.

[21] See, *e.g.*, *Dairyland Ins. Co.* v. *Rose*, 92 N.M. 927, 591 P.2d 281 (1979); *K. L. House Const. Co.* v. *City of Albuquerque*, 91 N.M. 492, 576 P.2d 752 (1978); N.M. Stat. Ann. §§ 44-7-1 to 22 (1978). GAC's repeated assertion that arbitration was "delayed by illegal orders of the State court for more than two years" (Pet. 4; see also *id.* 13, 17) was squarely rejected in the judgment of the New Mexico Supreme Court holding that GAC had waived any right to arbitrate and that the controversy was in any event otherwise inarbitrable. This Court declined to review that decision (p. 3 *supra*), and the judgment is now final for all purposes. There is no basis whatsoever for GAC's continued claim that it was unjustly denied arbitration rights.

C. Other Reasons for Denying the Petition

In a Motion to Affirm or Dismiss the Appeal, UNC raised in the Ninth Circuit three grounds that independently justified the decision of the trial court without regard to the merits of its conclusion that it did not have subject matter jurisdiction. See *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U.S. 294 (1917). While the Ninth Circuit heard argument on that motion together with argument on the merits, it did not express a view about the arguments made in the motion.[22] However, each of those grounds is sufficient to establish that GAC cannot ultimately prevail in this case and each constitutes an additional reason for denying certiorari.

1. UNC's applications to the Santa Fe state court for review of the arbitration awards were removed by GAC to the United States District Court for the District of New Mexico, but were remanded by District Judge Bratton to the state court (App. C, *infra*) because he concluded that the Federal Arbitration Act did not provide a basis for subject matter jurisdiction and thus federal jurisdiction did not exist. See pp. 7-9 *supra*. That was a final decision on the same jurisdictional issue as is presented in this case,[23] with respect to the same parties and the same arbitration awards, and thus is *res judicata* with regard to that issue in this case, even though it could not have been appealed.

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[22] Since the grounds asserted in that motion were based upon occurrences after the decision of the trial court in this case, they could not have been presented to that court.

[23] Under 28 U.S.C. § 1447(d), an "order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise," with the exception of removals pursuant to 28 U.S.C. § 1443 relating to civil rights actions. See, *e.g.*, *Gravitt* v. *Southwestern Bell Tel. Co.*, 430 U.S. 723 (1977); *Metro Casualty Co.* v. *Stevens*, 312 U.S. 563, 568 (1942).

Napper v. *Anderson, Henley, Shields, Bradford & P.*, 500 F.2d 634, 636-37 (5th Cir. 1974), *cert. denied*, 423 U.S. 837 (1975); *Chandler* v. *O'Bryan*, 445 F.2d 1045, 1057 (10th Cir. 1971), *cert. denied*, 405 U.S. 964 (1972). *See also, e.g.*, 1B *Moore's Federal Practice* ¶ 0.405[5] at 655-56, ¶ 0.416[5] at 2201-02 (1980).

2. The Court of Appeal of the State of California for the Fourth Appellate District directed dismissal of an application by GAC to confirm the arbitration awards involved here on the ground that *in personam* jurisdiction over UNC did not exist in California.[24] App. B, *infra*. The Supreme Court of California denied GAC's petition for review of that decision, and this Court denied GAC's petition for writ of certiorari, so the decision is final for all purposes. See pp. 7-8 *supra*. Hence, the decision is *res judicata* as to that jurisdictional issue under California law,[25] and is entitled to the same *res judicata* effect in the federal courts under the Full Faith and Credit Clause and 28 U.S.C. § 1738. See, *e.g.*, *Durfee* v. *Duke*, 375 U.S. 106, 109 (1963); *Davis* v. *Davis*, 305 U.S. 32, 40 (1938). UNC's defenses to GAC's application for confirmation of the final arbitration award in this case included lack of *in personam* jurisdiction in California over UNC (see *Hanes Supply Co., v. Valley Evaporating Co.*, 261 F.2d 29 (5th Cir. 1958)); the decision described above establishes that defense as a matter of *res judicata;* and GAC's application would have to be dismissed for that reason even if the District Court had subject matter jurisdiction.

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[24] The California court held that personal jurisdiction over UNC could not be based upon its alleged consent thereto in the arbitration clause of the 1973 Supply Agreement because that agreement had been held to be void by decisions entitled to full faith and credit, and that UNC did not have sufficient contacts with California to otherwise give rise to personal jurisdiction. In addition, that court concluded that even if jurisdiction did exist, "the doctrine of forum non conveniens would require, at a minimum, a stay of the action here, in order to permit the pending action in the Santa Fe district court in New Mexico, in which the arbitration award is challenged, to proceed to judgment. Also, even if that action were not pending, the courts of New Mexico are obviously the more suitable forums to determine those issues with which they are intimately familiar." (App. B, p. B-2 *infra*)

[25] *M.I.B.* v. *Superior Court*, 106 Cal. App. 3d 228 (1980).

3. The arbitration clause in the 1973 Supply Agreement provided, among other things, that "judgment upon the award may be entered in any Court having jurisdiction thereof" (see Pet. at 3-4 n.2). The New Mexico trial court has held that it does have jurisdiction of UNC's applications for review of the arbitration awards involved here, and has vacated those awards in accordance with the scope of review applicable under the Federal Arbitration Act (App. D *infra*). GAC has appealed that decision to the New Mexico Supreme Court where it has been briefed and argued but not yet decided. See p. 9 *supra*. Under New Mexico law, that decision, unless and until reversed on appeal,[26] is *res judicata* both as to the jurisdiction of the New Mexico court and as to the invalidity of the arbitration awards,[27] and thus as noted above is entitled to the same *res judicata* effect in the federal courts by reason of the Full Faith and Credit Clause and 28 U.S.C. § 1738.[28] Accordingly, even if the federal district court below had both personal and subject matter jurisdiction, it could not grant GAC effective relief because it could not confirm an award that has been vacated in a decision that is *res judicata*.

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[26] *McDonald* v. *Padilla*, 53 N.M. 116, 202 P.2d 970, 974 (1948); *Prager* v. *El Paso National Bank*, 417 F.2d 1111, 1112 (5th Cir. 1969).

[27] *E.g.*, *Mundy & Mundy, Inc.* v. *Adams*, 93 N.M. 534, 602 P.2d 1021, 1025 (1979); *Gerety* v. *Demers*, 92 N.M. 396, 589 P.2d 180, 188 (1978); *Ortiz* v. *Suazo*, 91 N.M. 45, 570 P.2d 309, 313 (1977).

[28] Full faith and credit requires the application of *res judicata* to jurisdictional determinations as well as to determinations on the merits. *E.g.*, *Durfee* v. *Duke*, *supra*, 375 U.S. at 111; *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371 (1940). Moreover, even if the Federal Arbitration Act had conferred subject matter jurisdiction upon the federal courts, that jurisdiction would be concurrent with the jurisdiction of the state courts under the Act, in the absence of a clear exclusion of state court jurisdiction. *Dowd Box Co.* v. *Courtney*, 368 U.S. 502, 505-08 (1962).

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

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C. Memorandum Opinion and Order filed on December 11, 1980, in U.S. District Court for the District of New Mexico, in *United Nuclear Corporation* v. *General Atomic Co.*, Civ. No. 80-845 HB C-1

D. Opinion, Decision and Judgment, entered January 9, 1981, in N.M. District Court, Santa Fe County, in *United Nuclear Corp.* v. *General Atomic Co.*, No. 50827 ..... D-1

APPENDIX A

THE FEDERAL ARBITRATION ACT, 9 U.S.C. §§ 1-14 (1976)[1]

§ 1. "Maritime transactions" and "Commerce" defined; exceptions to operation of title

"Maritime transactions," as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce," as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce. (July 30, 1947, ch. 392, 61 Stat. 670, derived from Act Feb. 12, 1925, ch. 213, § 1, 43 Stat. 883.)

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part

[1] The Federal Arbitration Act was originally enacted by Act of February 12, 1925, ch. 213, 43 Stat. 883. Title 9 of the U.S. Code was enacted by Act of July 30, 1947, ch. 392, § 1, 61 Stat. 669.

thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. (July 30, 1947, ch. 392, 61 Stat. 670, derived from Act Feb. 12, 1925, ch. 213, § 2, 43 Stat. 883.)

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration. (July 30, 1947, ch. 392, 61 Stat. 670, derived from Act Feb. 12, 1925, ch. 213, § 3, 43 Stat. 883.)

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure.

The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof. (July 30, 1947, ch. 392, 61 Stat. 671, derived from Act Feb. 12, 1925, ch. 213, § 4, 43 Stat. 883, amended, Sept. 3, 1954, ch. 1263, § 19, 68 Stat. 1233.)[2]

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[2] The Act of Sept. 3, 1954, substituted "United States district court" for "court of the United States" in the first sentence; "Title 28, in a civil action" for "the judicial code at law, in equity" in the first sentence; "the Federal Rules of Civil Procedure" for "law for the service of summons in the jurisdiction in which the proceeding is brought" in the third sentence; and "the Federal Rules of Civil Procedure" for "law for referring to a jury issues in an equity action" in the eighth sentence.

§ 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator. (July 30, 1947, ch. 392, 61 Stat. 671, derived from Act Feb. 12, 1925, ch. 213. § 5, 43 Stat. 884.)

§ 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided. (July 30, 1947, ch. 392. § 1 Stat. 571, derived from Act Feb. 12, 1925. ch. 213, § 6, 43 Stat. 884.)

§ 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators,

or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States. (July 30, 1947, ch. 292 § 1, Stat. 672, derived from Act Feb. 12, 1925, ch. 213, § 7, 43 Stat. 884, amended, Oct. 31, 1951, ch. 655, § 14, 65 Stat. 715.)[3]

§ 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award. (July 30, 1947, ch. 392, 61 Stat. 672, derived from Act Feb. 12, 1925, ch. 213, § 8, 43 Stat. 884.)

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time

[3] The Act of Oct. 31, 1951 substituted "United States district court for" for "United States court in and for" and "by law for" for "on February 12, 1925, for."

within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. (July 30, 1947, ch. 392, 61 Stat. 672, derived from Act Feb. 12, 1925, ch. 213, § 9, 43 Stat. 885.)

§ 10. Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown,

or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators. (July 30, 1947, ch. 392. 61 Stat. 872 derived from Act Feb. 12, 1925, ch. 213, § 10, 43 Stat. 383.)

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration —

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties. (July 30, 1947, ch. 392, 67 Stat. 673, derived from Act Feb. 12, 1925, ch. 213, § 11, 43 Stat. 863.)

§ 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award. (July 30, 1947, ch. 392, 61 Stat. 673, derived from Act Feb. 12, 1925, ch. 213, § 12. 43 Stat. 385.)

§ 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered. (July 30, 1947, ch. 392, 61 Stat. 673, derived from Act Feb. 12, 1925, ch. 213, § 13, 43 Stat. 886.)

§ 14. Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926. (July 30, 1947, ch. 392. 61 Stat. 673, derived from Act Feb. 12, 1925, ch. 213, § 15, 43 Stat. 886.)

FULL FAITH AND CREDIT CLAUSE OF THE CONSTITUTION, ART. IV, SECTION 1

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

28 U.S.C. § 1738 (1976)

§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. (June 25, 1948, Ch. 646, 62 Stat. 947)

APPENDIX B

COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

United Nuclear Corporation,	)	
Petitioner,	)	
	)	
v.	)	
	)	
Superior Court of the State of California for the County of San Diego,	)	**4 Civ. No. 24286 (Super. Ct. No. 460547)**
Respondent,	)	
General Atomic Company,	)	
Real Party in Interest.	)	

Petition for writ of mandate directed to Superior Court of San Diego County. Jack R. Levitt, Judge. Peremptory writ issued as prayed.

This court has read and fully considered the petition for peremptory writ of mandate, etc., filed here on December 8, 1980, as well as all accompanying exhibits, the response to the petition, and all documents filed to date in this matter. The court finds no jurisdictional basis in the San Diego Superior Court for this action to confirm an arbitration award, because a competent court, the Supreme Court of New Mexico, has held the

agreement to arbitrate is void (*United Nuclear Corp.* v. *General Atomic Co.* (1979) 93 N.M. 105, 597 P.2d 290); *United Nuclear Corp.* v. *General Atomic Co.*, (August 29, 1980) .... N.M. .... , ... P.2d ....) and that decision is entitled to full faith and credit. (See *Thorley* v. *Sup. Ct.*, 78 Cal.App.3d 900. As to jurisdiction, see *Main* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 67 Cal.App.3d 19, 26, 27; *Commercial Factors* v. *Kurtzman Bros.*, 131 Cal.App.2d 133.) Although the procedure to challenge jurisdiction provided by Code of Civil Procedure section 418.10 is clearly available here and should have been followed (*Frey & Horgan Corp.* v. *Sup. Ct.*, 5 Cal.2d 401; *Atkins, Kroll & Co.* v. *Broadway Lumber Co.*, 222 Cal.App.2d 646; and cf. *Hartford* v. *Sup. Ct.*, 47 Cal.2d 447), it would serve no purpose to remand this matter to permit petitioner to invoke the statute, because there is no jurisdiction for the trial court to do anything other than dismiss the proceeding. We note, for completeness, this record does not reveal a sufficient basis to establish personal jurisdiction over petitioner (*Sibley* v. *Sup. Ct.*, 16 Cal.3d 442; *Archibald* v. *Cinerama Hotels*, 15 Cal.3d 853, 863-864; *Northern Natural Gas. Co.* v. *Sup. Ct.*, 64 Cal.App.3d 983, 991; *Floyd J. Harkness Co.* v. *Habermann*, 60 Cal.App.3d 696, 698; *Regents of University of New Mexico* v. *Sup. Ct.*, 52 Cal.App.3d 964; *Watson's Quality Turkey Products, Inc.* v. *Sup. Ct.*, 37 Cal.App.3d 360, 364-365), and even if it did, the doctrine of forum non conveniens would require, at minimum, a stay of the action here, in order to permit the pending action in the Santa Fe district court in New Mexico, in which the arbitration award is challenged, to proceed to judgment. Also, even if that action were not pending, the courts of New Mexico are obviously the more suitable forums to determine these issues with which they are intimately familiar. The parties have wasted too much time already in adding to the many forums in which they have litigated the state courts of California.

Let a peremptory writ of mandate issue (Code Civ. Proc., § 1088; *Krasley* v. *Sup. Ct.*, 101 Cal.App.3d 425, 433; *Goodenough* v. *Sup. Ct.*, 18 Cal.App.3d 692, 697) directing the superior court to dismiss this action.

CERTIFIED FOR PUBLICATION.

By /s/ BROWN, P.J.
Brown, P.J.

WE CONCUR:

By /s/ COLOGNE, J.
Cologne, J.

By /s/ STANIFORTH, J.
Staniforth, J.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

United Nuclear Corporation,	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
General Atomic Company, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc.,	)	**Civ No. 80-845 HB**
Defendant.	)	
Indiana & Michigan Electric Company,	)	
Third-Party Defendant.	)	

MEMORANDUM OPINION

This is the latest chapter in the long saga of litigation involving United Nuclear Corporation (UNC) and General Atomic Corporation (GAC). On June 9 and September 15, 1980, UNC filed two Petitions for Supplemental Relief in New Mexico state court, pursuant to N.M.Stat.Ann. § 44-6-9 (1978), seeking enforcement of prior state court judgments and vacation of GAC's arbitration awards. On October 10, 1980, GAC removed the action to this Court. The matter now comes on upon UNC's motion to remand. The Court finds that the motion is well taken and should be granted.

GAC's primary claim is that the action is removable because Sections 9 to 11 of the Federal Arbitration Act, 9 U.S.C. §§ 9-11, provide a basis for federal jurisdiction. The identical argument was made in a related action between these parties in the Southern District of California. There Judge Enright decided

that the arbitration act does not of itself confer an independent basis of federal jurisdiction. *General Atomic Co.* v. *United Nuclear Corp.*, No. 80-1585-E (S.D.Cal., decided Oct. 24, 1980). This Court agrees.

GAC also contends that UNC has, in Paragraph 9 of its Second Supplemental Petition for Relief, used language which creates federal question jurisdiction. Specifically, GAC points to UNC's allegations that the arbitration award violates "due process" and "the antitrust laws."

UNC's due process argument is based on its right to a disinterested and unbiased arbitration panel — a right specifically conferred by Section 10 of the Federal Arbitration Act. Because it has been concluded that the arbitration act does not create federal jurisdiction, GAC's argument must fail.

In answering GAC's contention that it invoked the federal antitrust laws, UNC asserts that it intended to invoke only the antitrust laws of the State of New Mexico, as it has done throughout this litigation. Although the petition may be inartfully drafted and subject to conflicting interpretations, the Court accepts UNC's construction of the language used. *See Simpson* v. *Utah*, 365 F.2d 185 (10th Cir. 1966) (peripheral federal issues not determinative of plaintiff's rights and not actually raised by plaintiff held insufficient to create federal jurisdiction). It would be difficult to comprehend why UNC would assert a federal claim at this point in the litigation after so assiduously avoiding one for so long.

There are other motions pending before the Court in this action. Because it is concluded that UNC's motion to remand should be granted, it is unnecessary to consider the remaining motions.

/s/ HOWARD BRATTON
Chief Judge

C-3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

United Nuclear Corporation, *Plaintiff,*	)	
vs.	)	
General Atomic Company, a partnership composed of Gulf Oil Corporation and Scallop Nuclear, Inc., *Defendant.*	)	**Civ No. 80-845 HB**
Indiana & Michigan Electric Company, *Third-Party Defendant.*	)	

ORDER

This matter having come on upon the motion of plaintiff United Nuclear Corporation to remand these proceedings to the District Court for the County of Santa Fe, and the Court having entered a memorandum opinion herein,

IT IS ORDERED that plaintiff United Nuclear Corporation's motion to remand is granted.

By /s/ HOWARD BRATTON
Chief Judge

APPENDIX D

IN THE
DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

United Nuclear Corporation,	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
General Atomic Company,	)	**No. 50827**
et al.	)	
Defendants,	)	
Indiana & Michigan Electric Company,	)	
Third-party Defendants.	)	

OPINION

This matter is before the Court on plaintiff's, United Nuclear Corp. (UNC), petition for supplemental relief pursuant to Section 9 of the New Mexico Declaratory Judgment Act, Section 44-6-9 N.M.S.A. 1978, and Section 10 of the Federal Arbitration Act 9 U.S.C. 10 seeking a declaration that the arbitration proceedings were barred by the earlier judgments of this Court and vacating the arbitration awards.

Defendant, General Atomic Co. (GAC), filed its response claiming that this Court lacks jurisdiction, improper venue, improper service and that the petitions fail to state a claim upon which relief can be granted.

There is one thing that can be said of this case with a great deal of certainty. There will be no end until all the issues are gathered together, presented to and decided by some court of last resort. For some time the case has been on parallel courses with the

courts on one course and an arbitration panel on the other. This is the first time the courses have converged presenting an opportunity for its final trek to appellate review.

JURISDICTION. This Court has had jurisdiction of the parties and subject matter since December 31, 1975. On April 2, 1976, this Court denied GAC's motion to dismiss this action for lack of personal jurisdiction. On October 15, 1976, the New Mexico Supreme Court affirmed. *United Nuclear Corp. v. General Atomic Co.*, 90 N.M. 97, 560 P2d 161. That issue was final and became the law of this case. No claim of lack of subject matter jurisdiction was made since the District Court is a court of general jurisdiction and the dispute arose from a contract between the parties. Art. VI, Sec. 13 New Mexico Constitution. The parties agree that state courts and federal courts have concurrent jurisdiction under the Federal Arbitration Act. *Commercial Metals Co. v. Balfour, Guthrie & Co.*, 577 F. 2d 264 (5th Cir. 1978). This Court has jurisdiction in this case to apply the Federal Arbitration Act. *United Nuclear Corp. v. General Atomic Co.*, 93 N.M. 105, 597 P2d 290, certiorari denied, 444 U.S. 911. That is the law of this case. This Court is bound by that law. The claim of lack of jurisdiction is without merit.

VENUE. This case was originally filed pursuant to the New Mexico Declaratory Judgment Act, Section 44-6-1 et seq. N.M.S.A. 1978. A judgment was entered by this Court on December 27, 1977. Section 8 of the Act mandates the Court to grant further relief based on a declaratory judgment when necessary or proper. Plaintiff has requested this Court for a declaration determining what, if any, effect the action of the arbitration panel has on the prior judgment. Venue is nothing more than the proper location of the forum to hear the case. It is a general rule that actions must be tried where brought unless the venue is changed. *Peisker v. Chaney*, 46 N.M. 159, 123 P2d 726. The same applies to supplementing a judgment previously entered. Venue is proper for consideration of further relief pursuant to Section 44-6-9 N.M.S.A. 1978.

Counsel have cited no cases directly stating that a state court considering affirmation or vacation of an arbitration award has to be in the district where the award was made nor have they cited any cases stating that it does not have to be in the district where the award was made.

Section 9 of the Federal Arbitration Act dealing with confirmation of the award states in part - -

> "If no court is specified in the agreement of the parties then such application may be made to the United States Court in and for the district within which such award was made."

Section 10 of the Act dealing with vacation of the award states in part - -

> "In either of the following cases the United States Courts in and for the district wherein the award was made may make an order vacating the award - -"

GAC argues that only a court, Federal or State, in the Southern District of California where the purported arbitration occurred can affirm or vacate the award. An action was filed by GAC in the United States District Court for the Southern District of California to confirm the award. *General Atomic Co. v. United Nuclear Corp.*, Case No. 80-1585-E (Sept. 9, 1980). The case was dismissed for lack of subject matter jurisdiction. The case met the same fate in the United States District Court in New Mexico, *United Nuclear Corp. v. General Atomic Co.*, Civ. No. 80-845HB (December 11, 1980). GAC filed an application to confirm the award in the Superior Court for San Diego County, California. *General Atomic Co. v. United Nuclear Corp.*, Case No. 560547. The Fourth Appellate Division, California Court of Appeals dismissed the action in the Superior Court. *United Nuclear Corp. v. Superior Court of the State of California for the County of San Diego*, 4 Civ. No. 24286 (December 16, 1980). Judge Brown dismissed the case for lack of jurisdiction. Judge Brown also held the prior judgments and decisions of the New

Mexico court were entitled to full faith and credit. Even if there had been no jurisdiction question that Court would have stayed the California case until this Court entered a judgment under the doctrine of forum non conveniens. As the matter now stands, if GAC's argument were correct, the arbitration award would remain in perpetual limbo. In Sections 9 and 10 of the Federal Arbitration Act the words "may be made" and "may make an order" are permissive rather than mandatory. Had Congress intended to restrict such action to a particular locale stronger language would have been used. *Allison, Inc., v. Menikin Storage, Inc.*, 452 F. Supp. 573 (1978).

The venue of this Court to consider the arbitration award pursuant to the Federal Arbitration Act is proper.

SERVICE. Service of the petitions requesting supplemental relief and vacation of the arbitration award was made by mailing to opposing counsel in conformity with Rule 5 of the New Mexico Rules for Civil Procedure. The same parties and same counsel are now as they have been in the past. A plethora of pleadings have been exchanged in the same manner. GAC used the petitions as a basis for removal of this case to Federal Court which was then remanded. Counsel was frank to admit there was no real difference whether the petitions were handed to him by the postman or a marshal. To hold otherwise would be to elevate form over substance. Service was proper in this case.

FAILURE TO STATE A CLAIM. GAC argues that the petitions fail to state a claim upon which relief can be granted, to the extent that they seek review of the arbitration awards other than as contemplated by Section 10 of the Federal Arbitration Act.

In considering the motion to dismiss for failure to state a claim for which relief can be granted, all facts well pleaded must be accepted as true and the motion may be granted only when it appears the plaintiff cannot be entitled to relief under any state of facts provable under the claim. *Runyan v. Jaramillo*, 90 N.M. 629, 567 P2d 478.

The petitions clearly state the grounds of the claim for relief: that the arbitrators exceeded their powers or imperfectly executed them. The petitions also state factual and legal matters in support of those claims. If the matters pleaded in the petitions are accepted as true the plaintiff is entitled to the relief requested. The claim of failure to state a claim is without merit.

THE ARBITRATION. A petition for a declaratory judgment on a contract between UNC and GAC was filed in this Court on December 31, 1975. On December 27, 1977, this Court entered a decision and judgment denying GAC's motion to stay proceedings and declared that GAC had waived any right it may have had to arbitration; that the issues of New Mexico antitrust violations were not arbitrable; that all other issues were so intertwined with the antitrust issue none were arbitrable. An interlocutory appeal was taken by GAC. On May 7, 1979, in *United Nuclear Corp. v. General Atomic Co.*, 93 N.M. 105, 597 P2d 290, the New Mexico Supreme Court affirmed the judgment as to waiver and nonarbitrability and held that the trial court's decision and judgment were not inconsistent with the two United States Supreme Court decisions, *General Atomic Co. v. Felter*, 434 U.S. 12 and 436 U.S. 493, arising out of this case. The United States Supreme Court denied certiorari. *General Atomic Co. v. United Nuclear Corp.*, 444 U.S. 911.

On May 18, 1978, the New Mexico Supreme Court issued a mandate to this Court for such further proceedings as may be proper.

The issues of waiver, nonarbitrability and no inconsistency with the United States Supreme Court decisions were final, the law of the case, res judicata and entitled to full faith and credit by all other courts and forums. In *Ealy v. McGahen*, 37 N.M. 246, 21 P2d 84 (1933) the New Mexico Supreme Court in discussing res judicata stated the following:

> "Final judgments are conclusive as to the claim or demand in controversy as to the parties in the suit and those in

> privity with them, not only as to every matter which was offered to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. Public policy requires that there be an end to litigation and that rights once established by a final judgment shall not again be litigated in any subsequent proceeding."

The very essence of GAC's motion to stay proceedings in this court was its claim that there was an agreement between the parties to arbitrate the dispute. The Court declared GAC had waived any right to arbitration. The legal effect of that declaration was that any agreement to arbitrate no longer existed; it vanished, disappeared.

On April 4, 1978, this Court entered a judgment declaring the contract between UNC and GAC to be void and unenforceable. That judgment was affirmed by the New Mexico Supreme Court on August 29, 1980. *United Nuclear Corp. v. General Atomic Co.*, ... N.M. .... . That judgment is final, res judicata, and entitled to full faith and credit until and unless reversed by the United States Supreme Court. At least from April 4, 1978, there was no contract. There was no agreement to arbitrate.

Following this Court's denial of GAC's motion to stay proceedings, GAC initiated arbitration proceedings. GAC did not petition a court to compel arbitration, since there was no doubt UNC had refused to arbitrate, but requested the American Arbitration Association for arbitration. Other than by implication in its motion to stay proceedings in this court, GAC has never petitioned a court to compel arbitratior At GAC's request the American Arbitration Association started arbitration proceedings. UNC under protest appointed an arbitrator and participated in the preliminary proceedings until it became apparent that a majority of the arbitrators would not be bound by the New Mexico judgments and decisions. UNC withdrew from any further participation. The arbitrator appointed by

UNC later filed a dissent to the action by the other arbitrators and resigned. The two remaining arbitrators then proceeded to do what the United States Supreme Court had refused to do — review and reverse the New Mexico Supreme Court decision of May 7, 1979. Congress has the power to constitute tribunals inferior to the United States Supreme Court. However, Congress by enacting the Federal Arbitration Act did not intend nor would it have the power to create a tribunal superior to or even co-equal with the United States Supreme Court. By some unfathomable sophistry the two arbitrators concluded that all proceedings in the New Mexico District Court and the New Mexico Supreme Court after April 2, 1976, were void or to use their words, "corom non judice." They reached that conclusion even though there is not the slightest hint that the United States Supreme Court intended such a result in the prior opinions. *General Atomic Co. v. Felter*, 434 U.S. 12 (Felter I) and 436 U.S. 493 (Felter II).

The United States Supreme Court decisions were quite straightforward: a state court cannot deny a party access to federal forums. At the time of Felter II, the United States Supreme Court had before it the judgment of this Court declaring that GAC had waived its right to arbitration and that the issues were not arbitrable. The only fault the Supreme Court found with the judgment was the one part which interfered with GAC's right of access to a federal forum. At the time GAC petitioned the United States Supreme Court for a Writ of Certiorari, *General Atomic Co. v. United Nuclear Corp.*, 444 U.S. 911, that Court had before it the decision of the New Mexico Supreme Court affirming the judgment declaring waiver and nonarbitrability and the holding there was no inconsistency with the prior decisions of the United States Supreme Court in this case. Certiorari was denied. Common sense and respect for the United States Supreme Court dictates that had the Court believed all action in the New Mexico courts was void after April 2, 1976, they would have said so. To make the interpretation the arbitrators did would place the United States

Supreme Court in a position of playing capricious games with the lower courts and litigants. This Court absolutely refuses to believe the United States Supreme Court would indulge in such conduct.

There is a vast difference between a right of access to a forum and a right to the relief sought in that forum. Neither of the parties could be denied access to the Federal District Court for Southern California or New Mexico or the state court in California. However, having access did not carry with it the right to the relief sought as evidenced by the rather hasty empty handed exit. GAC's right of access to the arbitration forum did not, under the facts of this case, carry any rights to the relief sought.

On April 4, 1978, this Court entered a judgment declaring the contract between UNC and GAC to be void and unenforceable. From April 4, 1978, there was nothing to arbitrate. The arbitrators were aware of that judgment. On August 29, 1980, the New Mexico Supreme Court affirmed the judgment. The arbitrators were aware of that decision. Undaunted the arbitrators made a purported award on September 10, 1980, in favor of GAC. If not before, at least after April 4, 1978, all action taken by the two arbitrators was corom non judice.

Considering the totality of the action of the arbitrators, the judgments and decisions of the New Mexico Courts and the opinions of the United States Supreme Court an inescapable conclusion appears. The two arbitrators simply did not agree with the results reached by the New Mexico courts. They chose to ignore the courts and reach their own results. Such action at best was a heedless disregard for the fundamental principles of American jurisprudence.

By failing to give full faith and credit to the valid final judgments and decisions of the New Mexico courts which were res judicata as to these parties the arbitrators exceeded their powers. At least after the judgment of this Court, which was

affirmed by the New Mexico Supreme Court, declaring there was no contract between the parties to arbitrate, the only powers in the arbitrators was to dismiss the proceedings. The arbitrators so imperfectly executed their powers that a mutual, final and definite award upon the subject matter was not made.

Plaintiff UNC is entitled to the relief requested in its petitions.

Some courts involved in this case have commented on the enormous costs for discovery and attorneys' services. There also have been enormous costs of the taxpayers in furnishing facilities, personnel from bailiffs to judges and mountains of paper logistics in the many courts this case has visited. Therefore this fervent prayer: Appellate Court, affirm, reverse or modify, but please do not remand.

/s/ JAMES W. MUSGROVE
James W. Musgrove
District Judge

Filed in Open Court
January 9, 1981

IN THE
DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

United Nuclear Corporation,	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
General Atomic Company,	)	**No. 50827**
et al.	)	
Defendants,	)	
Indiana & Michigan Electric Company,	)	
Third-party Defendants.	)	

DECISION

This matter came before the Court on plaintiff's petitions for supplemental relief pursuant to the New Mexico Declaratory Act and the mandate of the New Mexico Supreme Court and to vacate the arbitration award pursuant to the Federal Arbitration Act.

The Court for its decision makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On December 31, 1975, plaintiff, United Nuclear Corp. (UNC) filed an action for a declaratory judgment involving a contract between UNC and defendant, General Atomic Co. (GAC).

2. On April 2, 1976, this Court entered a judgment denying GAC's motion to dismiss for lack of personal jurisdiction.

3. On October 15, 1976, the New Mexico Supreme Court affirmed the judgment entered April 2, 1976, as to personal jurisdiction. *United Nuclear Corp. v. General Atomic Co.*, 90 N.M. 97. No further appeal was taken.

4. On November 29, 1977, GAC filed with the American Arbitration Association a demand for arbitration of the same dispute with UNC.

5. On November 30, 1977, GAC filed a motion to stay proceedings in this Court pending arbitration of the dispute.

6. On December 27, 1977, this Court entered a decision and judgment denying the motion to stay proceedings and declared that GAC had waived any right to arbitration, that the issues of violations of New Mexico antitrust laws were not arbitrable and that all other issues were so entertwined with the antitrust issues, none were arbitrable.

7. On May 7, 1979, the New Mexico Supreme Court affirmed this Court's decision and judgment of December 27, 1977, *United Nuclear Corp. v. General Atomic Co.*, 93 N.M. 105 and also held there was no inconsistency between the United States Supreme Court decisions, *General Atomic Co. v. Felter*, 434 U.S. 12 and 436 U.S. 493.

8. On October 9, 1979, the United States Supreme Court denied certiorari to review the New Mexico Supreme Court opinion referred to in Finding No. 7, *General Atomic Co. v. United Nuclear Corp.*, 444 U.S. 911.

9. On April 4, 1978, this Court entered a judgment declaring the contracts between UNC and GAC were null, void, unenforceable and of no effect whatever.

10. On August 29, 1980, the New Mexico Supreme Court affirmed this Court's judgment of April 4, 1978. *United Nuclear Corp. v. General Atomic Co.*, ... N.M. .... .

11. Under protest UNC named an arbitrator and participated in the preliminary proceedings of arbitration until March 29, 1979.

12. On March 29, 1979, the arbitration panel announced it would not give full faith and credit to the New Mexico judgments and decisions. UNC withdrew from further participation. Thereafter the arbitrator appointed by UNC resigned.

13. Shortly after the entry of same this Court's decisions and judgments of December 27, 1977 and April 4, 1978 and the New Mexico Supreme Court opinions of May 7, 1979 and August 29, 1980 were furnished the arbitrators.

14. On September 10, 1980, the two remaining arbitrators issued an arbitration award in favor of GAC. *In The Matter of An Arbitration Between General Atomic Company and United Nuclear Corporation*, No. 73-10-0078-77.

15. The United States District Court for the Southern District of California has dismissed GAC's application and motion to confirm the arbitration award for lack of jurisdiction. *General Atomic Co. v. United Nuclear Corp.* Case No. 80-1585E.

16. The United States District Court for the District of New Mexico has declined to assist in the confirmation of the arbitration award or to interfere with this Court's proceedings on the petitions filed herein. *United Nuclear v. General Atomic Co.*, Case No. Civ. 80-845-HB.

17. GAC's application to confirm the arbitration award filed in the State Court of California has been dismissed by the California Court of Appeals.

18. GAC has never petitioned any court to compel arbitration.

19. No court has ever ordered arbitration of the dispute between UNC and GAC.

20. The United States Supreme Court opinions in *General Atomic Co. v. Felter*, 434 U.S. 12, and 436 U.S. 493 held only that this court could not deny nor interfere with GAC's right of access to the federal forum.

CONCLUSIONS OF LAW

1. This Court has personal and subject matter jurisdiction in this cause for the purpose of granting supplemental relief under the New Mexico Declaratory Judgment Act and the Federal Arbitration Act.

2. The venue in this Court is proper for granting supplemental relief under the New Mexico Declaratory Judgment Act.

3. The venue in this Court is proper for vacating the arbitration award pursuant to the Federal Arbitration Act.

4. This Court's decision and judgment of December 27, 1977, declaring that GAC had waived its right to arbitration and that the issues were not arbitrable is a valid final judgment. The judgment is res judicata as to these parties and has been since December 27, 1977. The judgment is entitled to full faith and credit by all courts and forums.

5. The opinion of the New Mexico Supreme Court holding that there was no inconsistency between the United States Supreme Court decisions and the judgment of this Court is the law of this case. It is res judicata as to these parties and is entitled to full faith and credit.

6. The judgments of this Court of April 4, 1978, and May 17, 1978, are valid final judgments, declaring the contracts between the parties to be null, void and unenforceable.

7. At least as of April 4, 1978, there was no agreement between the parties to arbitrate their dispute.

8. The arbitrators had no jurisdiction to issue an award in the purported arbitration.

9. In failing to give full faith and credit to the judgments and decisions of this Court and the New Mexico Supreme Court the arbitrators acted in manifest disregard of the law.

10. The arbitrators exceeded their powers.

11. The arbitrators so imperfectly executed their powers that a mutual, final and definite award was not made.

12. Plaintiff is entitled to a supplemental judgment of this Court declaring that the judgment of December 27, 1977 is not affected by the purported award of the arbitrators because the action of the arbitrators was illegal, void and of no effect.

13. Plaintiff is entitled to a judgment of this Court vacating the purported award of the arbitrators as provided by Section 10 of the Federal Arbitration Act.

All requested findings of fact and conclusions of law not adopted herein are hereby refused.

/s/ JAMES W. MUSGROVE

James W. Musgrove
District Judge

Filed in Open Court
January 9, 1981

IN THE
DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

United Nuclear Corporation,	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
General Atomic Company,	)	**No. 50827**
et al.	)	
Defendants,	)	
Indiana & Michigan Electric Company,	)	
Third-party Defendants.	)	

JUDGMENT

This matter came before the Court on plaintiff's petitions for supplemental relief pursuant to Section 9 of the New Mexico Declaratory Act and to vacate the arbitration award pursuant to Section 10 of the Federal Arbitration Act. The Court having considered the matters presented, having heard argument of counsel and having entered its decision, which by reference is made a part of this judgment, finds the plaintiff is entitled to the relief requested.

IT IS THEREFORE ORDERED AND DECLARED that the action of the arbitration panel and the purported award issued by the arbitration panel in *In The Matter of An Arbitration Between General Atomic Company and United Nuclear Corporation*, No. 73-10-0078-77, American Arbitration Association is illegal, void and of no effect on the judgment entered by this Court on December 27, 1977, and plaintiff is still entitled to all the rights, benefits and relief granted by that judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the arbitrators in *In The Matter of An Arbitration Between General Atomic Company and United Nuclear Corporation*, No. 73-10-0078-77 having exceeded their powers and having so imperfectly executed their powers that a mutual, final and definite award upon the subject matter was not made, the award is hereby vacated and held for naught.

/s/ JAMES W. MUSGROVE
James W. Musgrove
District Judge

Filed in Open Court
January 9, 1981

Petitioner's Reply Brief

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No. 81-1221

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

GENERAL ATOMIC COMPANY,

Petitioner,

v.

UNITED NUCLEAR CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1221

GENERAL ATOMIC COMPANY,

Petitioner,

v.

UNITED NUCLEAR CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S REPLY BRIEF

UNC agrees that the legal issue presented in our petition is "straightforward" (Br. in Opp., p. 2), and it quotes, with approval, from Professor Wright's treatise on federal civil procedure, which notes that this Court "has not ruled on the point" (Br. in Opp., p. 11). UNC does *not* quote all of Professor Wright's discussion regarding this subject and therefore omits his comparison of the language of Section 4 with that of Section 9 of the Federal Arbitration Act, and his observation that "Section 9 . . . on its face could be read as granting the district court jurisdiction of applications to enforce awards of arbitrators." 13 Wright, Miller & Cooper, *Federal Practice and Procedure*, § 3569, p. 468 (1975).

The plain language of Section 9 "on its face" and of 28 U.S.C. § 1331[1] was overridden, in this case, by the lower courts because they mistakenly believed that other lower-court decisions permitted this approach to the Federal Arbitration Act. Yet this Court has had to reiterate time and again for the guidance of the lower federal courts that explicit Congressional language may not be brushed aside. Several decisions in this Term of Court have once more made that point. *Weinberger* v. *Catholic Action of Hawaii/Peace Education Project*, No. 80-1377, 50 U.S. Law Week 4027, 4029 (December 1, 1981); *Watt* v. *Energy Action Educational Foundation*, No. 80-1464, 50 U.S. Law Week 4031, 4034 (December 1, 1981); *see United States* v. *Vogel Fertilizer Co.*, No. 80-1251, 50 U.S. Law Week 4137, 4140 (January 13, 1982). The principle stated for a unanimous Court in *United States* v. *Clark*, No. 80-1121, 50 U.S. Law Week 4128, 4129 (January 12, 1982), really governs this case:

> If the statutory language is clear, it is ordinarily conclusive.

UNC's response to our "straightforward" jurisdictional issue and to our concise legal discussion of the statutory language and its policies is to bury the issue in a 26-page Brief in Opposition beneath a confusing recitation of the many procedural stages of the continuing battle between UNC and GAC over a very valuable uranium supply contract.[2] This Court is also asked by

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[1] UNC does not dispute the proposition that an application to confirm an arbitration award under Section 9 of the Act is a "civil action arising under the . . . laws . . . of the United States." 28 U.S.C. § 1331.

[2] A more accurate and disinterested history of the litigation appears in the Partial Award of the Arbitration Panel, which is Appendix K (pp. 25a-54a) to GAC's Petition for a Writ of Certiorari in *General Atomic Co.* v. *United Nuclear Corp.*, No. 80-2106. We refer the Court to that petition and to the appendices thereto for a more balanced presentation of past events, including the fact that two federal judges in final orders ruled that the arbitration panel had the authority to hear and decide the *res judicata* and full-faith-and-credit claims made by UNC.

UNC to deny certiorari because various rulings entered in New Mexico and California *after* the federal district court refused in October 1980 to assume jurisdiction over GAC's confirmation proceeding allegedly establish that GAC "cannot ultimately prevail in this case" (Br. in Opp., p. 23). We disagree with that assertion, and responded to each of UNC's specious contentions in the court of appeals when UNC moved to have GAC's appeal dismissed on these same grounds.[3] Indeed, the court of appeals accepted none of these arguments.

But the principal point with regard to these matters, as with regard to UNC's other assertions based on the complex history of this litigation,[4] is that they are irrelevant at this juncture. UNC's claims can be presented to, and decided by, the United States District Court if that court has jurisdiction, as 9 U.S.C. § 9 and 28 U.S.C. § 1331 plainly provide, to consider an application to confirm the arbitration awards. The *only* issue now before this Court is not whether GAC or UNC will "ultimately prevail," but whether a federal court in California — indeed, *any* court in California — may hear the parties' substan-

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[3] We are lodging with the Clerk, for the Court's convenience, copies of GAC's Response to Appellee's Motion to Affirm or Dismiss the Appeal filed in the Court of Appeals for the Ninth Circuit in *General Atomic Co.* v. *United Nuclear Corp.*, No. 80-5830.

[4] One point emphasized by UNC deserves prompt correction. UNC attempts to make an issue of the fact that no court compelled it to arbitrate and that the last phase of arbitration was *ex parte*. An order to compel arbitration was unnecessary in this case because UNC proceeded with arbitration, selected its own party-appointed arbitrator, agreed without any compulsion to share the expenses of the neutral arbitrator and actively participated in the first phases of arbitration proceedings, including the filing of extensive briefs with the Panel and three days of hearings in San Diego. The GAC-UNC arbitration agreement and the rules of the American Arbitration Association required the Arbitration Panel to proceed with the arbitration in UNC's absence after UNC decided not to participate in the previously scheduled final hearing.

tive arguments and decide to confirm or vacate arbitration awards made in California after the arbitrators held lengthy hearings on law and fact in California.[5]

We have discussed in our petition (pp. 13-17) the reasons why that question is important — particularly in a period when, as noted in the Chief Justice's recent *Report on the State of the Judiciary*, the civil-case burden on federal judges has escalated six times as fast as the increase in population. The problem becomes even more serious in complex cases concerning very valuable commercial transactions, which, if litigated in the courts, could tie up judicial machinery for extended periods. Large companies *must* be encouraged to choose arbitration as a means of resolving disputes growing out of their commercial relationships. Such encouragement is possible only if arbitration is "a realistic alternative," and is seen to be "final and binding" by those who contract for it. This was why Congress in 1925 directed that after an arbitration is concluded, confirmation is to take place either in the court which the parties "specify" or, if no court has previously been agreed upon, in "the United States Court in and for the district within which such award was made." If the winning party in an arbitration is denied *any* forum for confirmation (as the courts below believed, *see* Pet., pp. 9a, 15a), and if the losing party is permitted to shop for a forum anywhere in the country, as UNC has been permitted to do by the rulings below and by the state court in

[5] UNC's attitude towards the arbitrators — former Justice Walter V. Schaefer of Illinois and former Secretary of Labor W. Willard Wirtz — is typified by the description provided by its counsel to the New Mexico Supreme Court during oral argument on December 15, 1981:

> We are confronted here with a rogue arbitration, arbitration run amok, arbitration gone berserk, and a legal war has been fought, which could be equated to a monstrous shell game, with General Atomic trying to keep us out of court until the award was granted by their tamed arbitrators, and then saying the standard of review is completely different.

New Mexico, the remedy provided by the Federal Arbitration Act becomes useless. This Court has had little opportunity in recent years to interpret and apply the Federal Arbitration Act. This case would permit the Court to decide an important jurisdictional question and thereby to emphasize to lower courts and to the business community that an effective alternative to judicial resolution of their disputes is available.

UNC has no answer to these arguments other than to insist mistakenly that lower courts have required an independent basis for federal jurisdiction under Section 9, and to cite opinions in which the terms "independent jurisdictional basis" have been used with reference to the Federal Arbitration Act. UNC cannot dispute, however, our assertion that there is only *one* reported case before this one — *Bangor & Aroostock R. Co.* v. *Maine Central R. Co.*, 359 F.Supp. 261 (D.D.C. 1973) — in which an action to confirm an arbitration award was dismissed on this ground. [6] And, notwithstanding UNC's very strained efforts to explain away the language of the Second Circuit in *Reed & Martin, Inc.* v. *Westinghouse Electric Corp.*, 439 F.,2d 1268, 1276 (2d Cir. 1971) (Br. in Opp., p. 15), there can be no doubt that if the Second Circuit had believed that only diversity-of-citizenship would have sustained federal subject-matter jurisdiction in that case, it would not have included in its opinion the language which begins with the word "Furthermore," which we have quoted at pp. 12-13 of our petition. That portion of the opinion was patently an alternative holding that, even in the absence of diversity-of-citizenship, a federal district court has jurisdiction to confirm an award resulting from an arbitration held under the Federal Arbitration Act. That conclusion conflicted with the decisions of the courts below.

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[6] An unreported decision in *Knox County Hospital Ass'n* v. *Pathman Construction Corp.*, (N.D. Ill. 1981), followed the *Bangor & Aroostock* holding with no substantial independent reasoning by District Judge Julius Hoffmann.

There is, finally, no substance to UNC's suggestion that the decision below "simply applied" a proposition of law which GAC had urged in an earlier phase of the dispute between them (Br. in Opp., pp. 11-12). When UNC sought in 1979 and 1980 to enjoin the arbitration and invoked the Federal Arbitration Act as the basis for subject-matter jurisdiction, GAC moved to dismiss and argued, *inter alia*, that there was no federal jurisdiction over a proceeding not specified in the Act, even if the proceeding relates to an arbitration conducted under federal law. Nowhere in the Federal Arbitration Act is a party authorized to request a federal court to enjoin arbitration. Consequently, UNC's injunction suits against the arbitration did not "arise" under the Federal Arbitration Act within the meaning of 28 U.S.C. § 1331 and were not authorized by any specific provision of the Act. GAC never argued or suggested to the district court, however, that the court lacked jurisdiction over an action for confirmation, where the Act specifies that the application be made "to the United States court in and for the district within which such award was made." An application to confirm an award under Section 9 plainly does "arise" under federal law, so that the federal court has jurisdiction pursuant to 28 U.S.C. § 1331.

CONCLUSION

The issue presented in our petition for a writ of certiorari is a clear-cut question of law. No disputed facts are relevant to resolution of that issue. It is an extremely important question for the future of arbitration and for the enforceability and acceptability of the remedy provided by the Federal Arbitration Act. The Second Circuit has indicated, in an alternative holding, that it disagrees with the result reached here by the Ninth Circuit, and the Fifth Circuit has explicitly reserved judgment on the question. The writ of certiorari should be granted because the jurisdictional issue affects the future vitality of the Federal Arbitration Act, because this case concerns one of the most

substantial commercial arbitrations ever conducted, and because this Court has, on two prior occasions, taken summary action to prevent the unconstitutional denial of GAC's federal right to arbitration — a right which would be effectively denied if neutral judicial forums for enforcement of GAC's award are closed.

Respectfully submitted,

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